

University of Michigan Journal of Law Reform

Volume 35

2002

After *Ellerth*: The Tangible Employment Action in Sexual Harassment Analysis

Susan Grover
William and Mary School of Law

Follow this and additional works at: <https://repository.law.umich.edu/mjlr>



Part of the [Civil Rights and Discrimination Commons](#), [Jurisprudence Commons](#), [Labor and Employment Law Commons](#), and the [Law and Gender Commons](#)

Recommended Citation

Susan Grover, *After Ellerth: The Tangible Employment Action in Sexual Harassment Analysis*, 35 U. MICH. J. L. REFORM 809 (2002).

Available at: <https://repository.law.umich.edu/mjlr/vol35/iss4/4>

This Article is brought to you for free and open access by the University of Michigan Journal of Law Reform at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in University of Michigan Journal of Law Reform by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

AFTER *ELLERTH*: THE TANGIBLE EMPLOYMENT ACTION IN SEXUAL HARASSMENT ANALYSIS

Susan Grover*

In this Article, Professor Grover argues that courts too readily allow employers to avoid vicarious liability for supervisors' unlawful sexual harassment of subordinates. The Article explores the breadth of the affirmative defense first introduced in the Supreme Court's 1998 cases of Faragher v. Boca Raton and Burlington Indus., Inc. v. Ellerth. That defense clears an employer of liability for a supervisor's unlawful sexual harassment if (a) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. Because the defense applies only if the harasser takes no tangible employment action against the harassed employee, the meaning ascribed to the "tangible employment action" concept is pivotal.

This Article concludes that courts often define the term too narrowly, or simply engage in outcome-based analysis, allowing defendants to invoke the affirmative defense in cases that actually involve tangible employment actions, and thus should not qualify for the defense. After reviewing the history sexual harassment doctrine and of the rules for imputing liability to employers, Professor Grover explains the ways in which the Supreme Court's Ellerth and Faragher decisions resolved some questions about imputing liability for harassment, but created others. She explores the range of meanings courts ascribe to the tangible employment action concept, and suggests that such a broad application of the affirmative defense defeats the purpose of Title VII.

INTRODUCTION

With one exception,¹ federal employment discrimination law holds employers liable for their supervisors' acts of discrimination, regardless of the employer's negligence or knowledge of the discrimination.² This general "rule of uniform

* Director of Equal Opportunity, College of William and Mary and Associate Professor of Law at William and Mary School of Law. A.B., Hollins College; J.D., Georgetown. The author has written articles on topics related to women's rights, employment discrimination and civil procedure have appeared in numerous publications.

1. The exception, applicable in certain harassment cases, is the subject of this Article.
2. Employers are thus "strictly" liable for unlawful supervisory discrimination, including all types of harassment. *Faragher v. Boca Raton*, 524 U.S. 775, 790, 807 (1998). "Strict liability" (also known as "absolute liability") means "[l]iability that does not depend on

imputation"³ derives directly from the statutory language, which renders employers liable for the discriminatory acts of their "agents."⁴ In most discrimination cases, supervisors are quintessentially agents of the employer; a supervisor who discriminates in the course of taking an employment action that is his or her job to take, is necessarily operating as the agent of the employer.⁵ For this

actual negligence or intent to harm, but that is based on the breach of an absolute duty to make something safe . . . [a]lso termed *absolute liability*; *liability without fault*." BLACK'S LAW DICTIONARY 926 (7th ed. 1999). The concept of "strict" liability (liability regardless of fault) is thus distinct from the concept of defeasible liability, which may be strict (imposed in the absence of fault), but which may be evaded under proper conditions. The plaintiff in a strict liability case bears no burden to prove the defendant's knowledge or fault, but if the liability is defeasible, the defendant may escape the liability by proving its own reasonableness or due care. *Faragher*, 524 U.S. at 807.

3. This Article uses interchangeably the terms "impute liability to" and "hold vicariously liable." Black's Law Dictionary defines "imputed" to mean "attributed vicariously; that is an act, fact, or quality is said to be 'imputed' to a person when it is ascribed or charged to him, not because he is personally cognizant of it or responsible for it, but because another person is, over whom he has control or for whose acts or knowledge he responsible." BLACK'S LAW DICTIONARY 758 (6th ed. 1990). The Article refers to the courts' standard practice of holding employers vicariously liable for supervisors' acts of discrimination as the "rule of uniform imputation."

4. This Article focuses on Title VII of the 1964 Civil Rights Act because that is the federal law forbidding workplace discrimination based on sex, including sexual harassment at work. See 42 U.S.C. § 2000e-2 (defining "unlawful employment practices" as discrimination based on "race, color, religion, sex, or national origin"). Section 703 of Title VII of the Civil Rights Act of 1964 provides:

The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person. . .

42 U.S.C. § 2000e (b).

Other federal laws, such as those prohibiting age and disability discrimination, similarly impose liability on employers for the discriminatory acts of their supervisors. See Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621, 629 (defining "employer" to include any agent of an employer); Americans with Disabilities Act of 1990, 42 U.S.C. § 12101, 12111 (defining "employer" to include agents of employers). The law does not generally impose liability on the supervisors themselves. See, e.g., *Lenhardt v. Basic Inst. of Tech., Inc.*, 55 F.3d 377, 380-81 (8th Cir. 1995) (describing the recent trend away from holding individual managers liable under Title VII); *Sauers v. Salt Lake City*, 1 F.3d 1122, 1125 (10th Cir. 1993) (Title VII relief is against employer, not against individual employees whose acts create liability) quoting *Busby v. City of Orlando*, 931 F.2d 764, 772 (11th Cir. 1991); see also SOLOTOFF & KRAMER, SEX DISCRIMINATION AND SEXUAL HARASSMENT IN THE WORK PLACE § 2.02[1] (2000) (noting recent decisions that have rejected individual supervisor liability under Title VII).

5. The RESTATEMENT (SECOND) OF AGENCY § 219(1) provides what the Supreme Court has described as "a central principle of agency law: 'A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.'" See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 755-56 (1998) (quoting RESTATEMENT (SECOND) OF AGENCY § 219(1)). Compare this with the rule for assessing employer responsibility for punitive damages. In the latter inquiry, employers who lack knowledge of their

reason, most discrimination cases have yielded little discussion of the rule of uniform imputation. The single exception to the rule, by contrast, has received substantial attention since its introduction in 1998. That exception arises in certain cases involving sexual or other discriminatory workplace harassment.⁶ As with "mainstream" (non-harassment) discrimination cases, the law imputes liability to employers for all actionable supervisor harassment, without regard to employer knowledge or negligence. Unlike employers charged with mainstream discrimination, however, employers charged with harassment enjoy the possibility of an escape route in some cases. The potential escape route is an affirmative defense, and it is available in those cases in which the harassment involves no tangible employment action against the victim.⁷ Because the potential for employers to escape application of the rule of uniform imputation exists only in harassment cases that involve no tangible employment action, it matters a great deal what definition courts give to the term: "tangible employment action." This Article explores the evolving definition of that concept.

Part I of the Article sets forth the history of pertinent sexual harassment doctrine and of the rules for imputing liability to employers. Part II explains the ways in which Supreme Court decisions have resolved some questions about imputing liability for harassment, but created others. It looks at the birth of the tangible employment action concept as a bright line test for determining which imputation analysis applies to a given harassment case. In Part III, the Article explores the range of meanings courts ascribe to the tangible employment action concept. The Article concludes that courts often define the term too narrowly, allowing defendants to invoke the affirmative defense in cases that actually involve tangible employment actions, and thus should not qualify for the defense.

supervisors' culpable behavior may be able to avert the imposition of punitive damages. *Kolstad v. American Dental Association* allows a good faith defense. 527 U.S. 526, 545 (1999).

6. This Article focuses on sexual harassment, but harassment may be actionable when motivated by some other protected trait, such as race or religion. See, e.g., *Cerros v. Steel Techs., Inc.*, 288 F.3d 1040, 1047 (7th Cir. 2002) (stating that severe or pervasive verbal racial and religious harassment actionable under Title VII).

7. Because individual supervisors are not personally liable under Title VII, victims of unlawful sexual harassment who fail to recover from the employer, effectively have a legal right with no remedy. Plaintiffs who lose Title VII's protections in this manner, however, may recover under state law. In fact, some state laws provide broader remedies than those available under Title VII. See, e.g., *Laughinghouse v. Risser*, 786 F. Supp. 920 (D. Kan. 1992) (stating that state law permits recovery against both supervisor and employer).

I. BACKGROUND

Title VII prohibits sex discrimination in employment.⁸ Sex discrimination occurs when supervisors base employment decisions, such as hiring and promotion, on considerations of an employee's sex, rather than or in addition to such legitimate considerations as the employee's qualifications and performance record.⁹ Sex discrimination also occurs when a supervisor engages in sexual harassment that alters the terms, conditions, or privileges of a subordinate's employment.¹⁰ Actionable sexual harassment may take any of a variety of forms. Workplace taunts and insults that are motivated by the victim's sex may give rise to sexual harassment discrimination claims, as may sexual demands and suggestions.¹¹ Sometimes actionable harassment culminates in the harasser's taking adverse job action against the victim, and sometimes it does not.¹²

The latter category—claims involving environmental harassment that does not include adverse employment action against the victim—first received Supreme Court recognition in the 1986 case of *Meritor Savings Bank v. Vinson*.¹³ At issue in that case was whether Mechele Vinson could win her Title VII harassment case, even though the harassing supervisor had not taken adverse job action against her.¹⁴ The Court concluded that she

8. The other categories of discrimination forbidden by Title VII are race, religion, color and national origin. 42 U.S.C. § 2000e-2.

9. 42 U.S.C. § 2000e-2(a)(2). If there are several motives for an employment decision, some discriminatory and some not, the employer is nevertheless found liable, though proof of the nondiscriminatory reasons reduces the remedy, excluding money damages and certain types of injunctions. See 42 U.S.C. § 2000e-5(g)(2)(B).

10. Workplace sexual harassment is actionable under Title VII of the 1964 Civil Rights Act, which prohibits discrimination in employment based on race, sex, color, religion, and national origin, 42 U.S.C. § 2000e to 2000e-17. See, e.g., *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993) (explaining elements of hostile environmental sexual harassment claim); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986) (recognizing claims for hostile environment and quid pro quo sexual harassment). Sexual harassment violates the proscription of sex discrimination only if the harassment is motivated by the victim's sex. *Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75 (1998).

11. *Oncale*, 523 U.S. at 79–80.

12. *Faragher v. Boca Raton*, 524 U.S. 775, 786 (1998) (scope of actionable harassment not limited to economically measurable harm).

13. 477 U.S. 57 (1986).

14. *Id.* at 64. By the time of *Meritor*, it had already been well-established that cases in which supervisors barter sexual favors for job advantages violate Title VII. See *id.* at 68 ("It is without question that sexual harassment of female employees in which they are asked or required to submit to sexual demands as a condition to obtain employment or to maintain employment or to obtain promotions falls within protection of Title VII.") (emphasis in original) (quoting lower court, *Vinson v. Taylor*, No. 78-1793, 1980 U.S. Dist. LEXIS 10676, at *23

could.¹⁵ The *Meritor* Court distinguished between “quid pro quo” harassment cases, in which a supervisor threatens to take job-related action against the victim, and environmental cases like Vinson’s, in which the environment alone gives rise to the claim.¹⁶ The court suggested that both types of harassment could give rise to claims, but that the rules for imputing liability to employers might be different for the two.¹⁷ For purposes of imputing liability to the employer, quid pro quo harassment had always been treated like any other employment discrimination: subject to the rule of uniform imputation.¹⁸ With the recognition of environmental harassment, the *Meritor* Court called for rethinking of the rule’s uniformity. By definition, the new environmental claims lacked precisely the ingredient that had assured the existence of the agency relationship in quid pro quo cases: the supervisor’s discriminatory use of delegated power to take or threaten¹⁹ action against the plaintiff that it was within the supervisor’s job description to take. Because that guarantee of an agency relationship was absent from environmental harassment, the *Meritor* Court envisioned situations in which supervisors would engage in such harassment without the aid of delegated authority. For this reason,

(D.D.C. Feb 26, 1980)). Interestingly, the facts of Vinson’s case probably involved economic harm. The discriminatory harassment at issue arguably led to Vinson’s constructive discharge. The *Meritor* Court’s decision did not address that issue.

15. Courts accepted the quid pro quo theory of harassment more readily and earlier than they accepted the hostile environment cause of action. See Glenn George, *Employer Liability for Sexual Harassment: The Buck Stops Where?* 34 WAKE FOREST L. REV. 1, 3–5 & nn.13–23 (discussing courts’ ready acceptance of quid pro quo sexual harassment cause of action under Title VII and hesitance to recognize the hostile environment cause of action). The courts’ ultimate acceptance of sexually hostile environment claims was predicated on their well-established acceptance of racially hostile environment claims. See *Faragher*, 524 U.S. at 786 (citing race and national-origin cases upon which the *Meritor* Court predicated recognition of environmental sexual harassment claim).

16. 477 U.S. at 68.

17. *Id.*

18. See *Faragher*, 524 U.S. at 790 (relying on *Meritor*, 477 U.S. at 70–71, for the proposition that discrimination with tangible results has always resulted in employer liability regardless of employer knowledge or negligence); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 753 (1998) (noting “equivalence of quid pro quo label and vicarious liability”).

19. Prior to 1998, courts disagreed on whether the rule of uniform imputation applied to quid pro quo cases in which the supervisor did not carry out the threat. Some lower courts recognized as quid pro quo only those cases in which the supervisor actually followed through and took the threatened action against the harassment victim. See, e.g., *Bryson v. Chicago State Univ.*, 96 F.3d 912 (7th Cir. 1996), *Henson v. Dundee*, 682 F.2d 897, 908–09 (11th Cir. 1982). Other courts applied the rule of uniform imputation even where the threat was unacted. See, e.g., *Reinhold v. Virginia*, 135 F.3d 920, 933 n.3 (4th Cir. 1998), *vacated for reconsideration* in light of *Ellerth* and *Faragher*, 135 F.3d 920 (1998) (discussing pre-*Ellerth* court decisions holding that threats suffice to state a quid pro quo claim, despite the absence of action taken on the threats); *Karibian v. Columbia Univ.*, 14 F.3d 773, 778 (2d Cir. 1994).

the Court directed lower courts to use the principles of agency law to derive appropriate standards for environmental harassment cases.²⁰ In the wake of *Meritor*²¹ the lower courts generally held employers liable for supervisors' harassment of subordinates in accordance with the following schema:

POST-MERITOR

TYPE OF CLAIM	QUID PRO QUO	HOSTILE ENVIRONMENT
<i>Facts Typically Giving Rise to Claim:</i>	Harasser threatens or takes employment action against (or in favor of) a subordinate employee ²² in exchange for sexual favors.	Sexual harassment is severe or pervasive enough to create an abusive work environment, thereby altering the terms, conditions or privileges of employment.
<i>Standard for Holding Employer Liable for Acts of Supervisor:</i>	Employer is liable for all acts of supervisor, without regard to employer knowledge, negligence, response to harassment or attempt to guard against harassment.	Courts (charged by <i>Meritor</i> Court to) apply agency principals to the facts of the case in order to determine whether such principals warrant vicarious liability on the particular facts of the case.

In response to *Meritor's* command to devise an analysis appropriate to environmental cases, the lower courts produced such a disarray of approaches that the Supreme Court accepted certiorari in two appellate court decisions to resolve the circuit split on the

20. 477 U.S. at 63. Increasingly, it is clear that the only possible liability under Title VII is that of the employer, and that individual supervisors who engage in discriminatory acts are not liable in their individual capacity. See *supra* note 3. This means that limitations on the scope of employer vicarious liability for discrimination effectively limit the scope of Title VII itself.

21. Between the 1986 decision in *Meritor* and the 1998 *Ellerth* and *Faragher* decisions, the Court twice elaborated on the elements of the hostile environment cause of action itself. *Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75 (1998); *Harris v. Forklift Sys. Inc.*, 510 U.S. 17 (1993). Most importantly, the *Harris* Court held that the plaintiff in a hostile environment case need not prove psychological injury to establish harassment. 510 U.S. at 22.

22. Courts have sometimes defined "quid pro quo" to include cases in which a supervisor tries to bargain with a subordinate to exchange employment benefit or detriment for sexual favors or refusals, even though no tangible employment action ("TEA") against the subordinate ensues. See *Reinhold* 35 F.3d at 933 n.3 (discussing pre-*Ellerth* court decisions holding that threats suffice to state a quid pro quo claim, despite the absence of action taken on the threats). On the other hand, TEA's, as defined by the Supreme Court, may involve employment actions taken against the subordinate that are part and parcel of the harassment, even though they are not in retaliation for the subordinate's failure to submit to sexual overtures.

imputation issue. The two cases were *Faragher v. Boca Raton*²³ and *Burlington Industries v. Ellerth*.²⁴

II. BETH ANN FARAGHER AND KIMBERLY ELLERTH

Beth Ann Faragher and Kimberly Ellerth both claimed that their former employers should be held liable for their supervisors' sexual harassment.²⁵ Faragher's was inarguably a hostile environment case, calling upon the Court to elucidate the employer liability standard envisaged in *Meritor*.²⁶ Ellerth, by contrast, characterized her case as *quid pro quo*.²⁷ Ellerth's supervisor threatened to retaliate for Ellerth's refusal to submit to his sexual demands, but had never carried out the threats.²⁸ Ellerth apparently hoped that the threats themselves would qualify her case for the traditional *quid pro quo* rule of uniform imputation, without resort to the agency analysis that *Meritor* prescribed for environmental cases. Unfortunately for Ellerth, the Court realigned the boundaries between types of harassment, positing that it was not the threats but the actuality of employment action that rendered a harassment case subject to the traditional rule of uniform imputation. The Court placed unfulfilled threats on the environmental side of the employer liability divide, ultimately opening the possibility that Ellerth's employer might avoid liability for the harassment.²⁹

A. Kimberly Ellerth's Case

Kimberly Ellerth's harasser was Ted Slowik, her supervisor's supervisor.³⁰ According to Ellerth, Slowik sexually harassed her by making remarks about her physique and conditioning approval of client-based requests on her willingness to wear more revealing clothing.³¹ When Ellerth resisted Slowik's advances, Slowik warned her, "[Y]ou know, Kim, I could make your life very hard or very

23. 524 U.S. 775 (1998).

24. 524 U.S. 742 (1998).

25. *Faragher*, 524 U.S. at 780; *Ellerth*, 524 U.S. at 746.

26. *Faragher*, 524 U.S. at 791-92.

27. *Ellerth*, 524 U.S. at 749, 753, 765.

28. *Id.* at 747-48.

29. *Id.* at 754.

30. *Id.* at 747.

31. *Id.* at 748.

easy at Burlington.”³² Ellerth complained directly to Slowik, but did not complain to anyone else during the fourteen months that Slowik harassed her.³³ Although Ellerth knew that the company had an anti-harassment policy, she also knew that the policy required her to report the harassment to her immediate supervisor, who was required to report to the next higher supervisor, who was Ted Slowik himself.³⁴ Ultimately, Ellerth resigned her position, initially asserting reasons for leaving the company that were unrelated to the harassment.³⁵ Three weeks later, however, she sent a letter to explain that her real reason for leaving was in fact the harassment.³⁶ That letter was the first time she complained to anyone at the company other than Slowik.³⁷

Given the *Meritor* analytical paradigm, it was no wonder that Ellerth couched her complaint in terms of quid pro quo harassment: threats had been made. The problem with Ellerth’s lawsuit was that Slowik never followed through on the threats when Ellerth rejected his sexual advances.³⁸ The case was one of quid pro quo only in the sense that Slowik consistently told Ellerth that she would experience tangible job effects depending on how she responded to his requests. It was not a quid pro quo case, however, inasmuch as Slowik never took the threatened or promised actions.³⁹ Because Slowik did not take employment actions against Ellerth, the Supreme Court characterized her case as environmental and used the occasion, along with the *Faragher* case, to revisit more specifically the imputation issues raised by *Meritor*.⁴⁰

32. *Id.*

33. *Id.* at 748–49.

34. *Id.* at 748.

35. *Id.*

36. *Id.*

37. *Id.* at 748–49.

38. The only exception to this was the occasion when he refused to help her on the telephone with a customer matter because she refused to tell him what she was wearing at the time. *Id.* at 748.

39. In fact, Ellerth was actually promoted during her time with the company, despite her refusal to submit to Slowik’s demands. *Id.* at 748.

40. The Supreme Court did not explain what would happen where the target averted TEA by succumbing to sexual demands. The EEOC guidelines provided that such cases should be subject to the rule of uniform imputation. EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (June 18, 1999) available at <http://www.eeoc.gov>.

B. Beth Ann Faragher's Case

Beth Ann Faragher's case was simpler. During her college years, Beth Ann Faragher worked part time and during summers as a lifeguard for the City of Boca Raton, Florida.⁴¹ After she resigned her position, Faragher sued the City, claiming that two of her immediate supervisors, Bill Terry and David Silverman, had "created a 'sexually hostile atmosphere' at the beach."⁴² Faragher's complaint involved ongoing "'uninvited and offensive touching,' . . . lewd remarks; and . . . speaking of women in offensive terms."⁴³ She alleged that Terry, Chief of the Marine Safety Division that employed Faragher, "repeatedly touched the bodies of female employees without invitation, . . . put his arm around Faragher, with his hand on her buttocks, and once made contact with another female lifeguard in a motion of sexual simulation. He made crudely demeaning references to women generally, and once commented disparagingly on Faragher's shape."⁴⁴ He allegedly told a female job applicant that "female lifeguards had sex with their male counterparts and asked whether she would do the same."⁴⁵ Similarly, Silverman "once tackled Faragher and remarked that, but for a physical characteristic he found unattractive, he would readily have had sexual relations with her."⁴⁶ Silverman also "pantomimed an act of oral sex . . . [w]ithin earshot of the female lifeguards, . . . made frequent, vulgar references to women and sexual matters, commented on [women's bodies], and . . . told female lifeguards that he would like to engage in sex with them."⁴⁷

A bench trial yielded a victory for Faragher.⁴⁸ The trial court concluded that Faragher's supervisors' sexual harassment of

41. *Faragher*, 524 U.S. at 780.

42. *Id.*

43. *Id.* Faragher's complaint alleged "that Terry once said that he would never promote a woman to the rank of lieutenant, and that Silverman had said to Faragher, 'Date me or clean the toilets for a year.'" *Id.* In addition to the Title VII claim, Faragher's complaint included claims arising under 42 U.S.C. § 1983, and state law. *Id.*

44. *Id.* at 782 (citations omitted).

45. *Id.*

46. *Id.*

47. *Id.* (citations omitted).

48. *Id.* at 783. The judges at all levels were generally in agreement that the harassers were Faragher's supervisors and that the facts of Faragher's case established the elements of a hostile environment case, so the only question was whether liability should be imputed to the employer.

Faragher violated Title VII.⁴⁹ The trial court also concluded that agency principles required imputation of the harassment to the employer, as did the employer's "knowledge, or constructive knowledge."⁵⁰ The Eleventh Circuit reversed.⁵¹ Although it agreed that the supervisors had engaged in unlawful harassment, it concluded that agency principles did not warrant imputation of the harassment to the employer.⁵² The Supreme Court, in turn, disagreed with the Eleventh Circuit and ordered reinstatement of the judgment for plaintiff.⁵³

C. The Rule of Faragher and Ellerth

Faragher and *Ellerth* did two things: first, they realigned the boundary between harassment cases subject to the rule of uniform imputation and those in which employers might avoid liability; and second, they devised a new analytic framework for determining when, in the latter group, such avoidance would be possible. As to the boundary realignment, the Court exempted cases such as *Ellerth*'s, in which threats were made but not carried out, from the rule of uniform imputation. The crucial demarcation, the *Faragher/Ellerth* Court said, is not that suggested by *Meritor* between quid pro quo cases (involving sexual demands) and environmental cases; rather, it is between cases in which the harasser actually takes a tangible employment action (hereinafter "TEA"⁵⁴) against the victim, regardless of whether sexual demands are made, and cases in which the supervisor takes no TEA, even though threats may have been made.⁵⁵ If the harassment involves a TEA, the Court ex-

49. *Id.* Specifically, the trial court concluded that the supervisors engaged in "discriminatory harassment sufficiently serious to alter the conditions of Faragher's employment and constitute an abusive working environment." *Id.* at 783.

50. *Id.* (quoting trial court, 864 F. Supp. 1552, 1563 (S.D. Fla. 1994)).

51. *Id.* at 783-84.

52. *Id.* at 784. The appellate panel acknowledged that "the existence of the agency relationship" always aids a supervisor to accomplish hostile environment sexual harassment "because his responsibilities include close proximity to and regular contact with the victim," but concluded that traditional agency law does not employ so broad a concept of aid as a predicate to employer liability, requiring something more than a mere combination of agency relationship and improper conduct by the agent. *Id.* at 785.

53. *Id.* at 808.

54. Courts that continue to use the "quid pro quo" language in the post-*Ellerth* era may create confusion because it is not clear whether the term refers to all cases involving threats or bargains (as some courts read the language to mean in *Meritor*) or only tangible employment action cases.

55. The Court purported to base the new analysis on the prong of agency law that renders principals liable when the existence of the agency relationship aids their servants in

plained, the case qualifies for the traditional rule of uniform imputation.⁵⁶ Thus, it was not the presence of sexual demands that qualified a case for the uniform imputation rule, but the presence of concrete job action against the victim.

The *Faragher/Ellerth* Court went on to sketch a new analytic method to guide lower court determinations of whether to impute liability to employers in non-TEA (hereinafter "environmental" or "hostile environment") cases.⁵⁷ This analysis renders the employer presumptively liable both for supervisors' TEA action harassment and for supervisors' hostile environment harassment. However, whereas the employer has no opportunity to rebut the presumption in TEA cases, the employer in environmental cases has an opportunity to avoid vicarious liability if it can prove both elements of an affirmative defense.⁵⁸ In the words of the *Faragher* Court:

the commission of wrongful acts. *Faragher*, 524 U.S. at 789. *But see* Michael Harper, *Employer Liability for Harassment Under Title VII: A Functional Rationale for Faragher and Ellerth*, 36 SAN DIEGO L. REV. 41, 55-56 (1999) (arguing that the "*Faragher-Ellerth* formulation was not compelled by common law agency principles"). *Ellerth/Faragher* effectively established a presumption that supervisors who harass, whether environmentally or by taking more formal action against the subordinate, are necessarily aided by the agency relationship. The Court's injection of the affirmative defense reflected the Court's belief that the agency relationship necessarily aids the harassment in TEA cases, but not of necessity in environmental cases. The suggestion that the Court relied on agency law is belied by the Court's election of the demarcation between TEA and other cases, because *quid pro quo* cases not resulting in a TEA are certainly empowered by the agency relationship as well.

56. *Faragher*, 524 U.S. at 789. The *Faragher* Court acknowledged the unanimity with which courts had accepted the rule that employers cannot avoid vicarious liability for sexual or racial harassment that involves supervisors' employment actions with tangible results, such as hiring, firing, promotion, compensation, and work assignment. *Id.* Even in the absence of a TEA, the Court noted, the employer cannot avoid vicarious liability if the employer or high-echelon officials actually know of the harassment.

57. Despite the *Meritor* mandate to predicate such analysis on agency law, the *Faragher/Ellerth* Court ultimately created a structure that turned more on negligence principles than on agency law. Agency law focuses generally on the relationship between the principal and its agent, whereas the *Faragher/Ellerth* framework focuses ultimately on considerations of reasonableness. In fact the Court perceived its prescribed analytic framework as a compromise between the principle of vicarious liability for harm caused by misuse of supervisory authority and "Title VII's . . . policies of encouraging forethought by employers and saving action by objecting employees." *Ellerth*, 524 U.S. at 764; *Faragher*, 524 U.S. at 807.

58. By making these issues part of an affirmative defense, rather than elements of plaintiffs claim, the Court placed the burden of persuasion on the defendant. This procedural shift of the burden of is crucial because, in theory, the plaintiff has now won the case unless the employer proves the defense by a preponderance of the evidence. *But see* Cheryl L. Anderson, *Thinking Within the Box: How Proof Models Are Used To Limit The Scope Of Sexual Harassment Law* 19 HOFSTRA LAB. & EMP. L.J. 125, 134 (2001) (suggesting employer is liable only if it fails on both prongs of the affirmative defense, where both defendant is negligent and the plaintiff is not negligent). In fact, either the defendant's negligence or the plaintiff's reasonable care destroys the affirmative defense. *See Faragher*, 524 U.S. at 807 (using conjunctive, rather than disjunctive, in describing the elements of the affirmative defense: "defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff

[A]n employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no [TEA] is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence. The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.⁵⁹

employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise" (emphasis added)).

In the wake of *Ellerth* and *Faragher*, a few courts suggested that those decisions had broadened the definition of "supervisor" from what it had been in prior case law. See Stephanie Ann Henning Blackman, *The Faragher and Ellerth Problem: Lower Courts' Confusion Regarding the Definition of "Supervisor,"* 54 VAND. L. REV. 123, 152 n.230 (citing cases). Cases prior to *Ellerth* and *Faragher* defined "supervisor" to mean someone with the power to hire, fire or otherwise set the conditions of employment. *Id.* at 125. In *Ellerth* and *Faragher*, the Supreme Court defined "supervisor" as someone with "immediate (or successively higher) authority over the employee." *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807. There is no necessary difference between these two definitions, inasmuch as "authority" over the subordinate connotes power to affect terms of employment. Given that the power to assign work is and always has been an indicium of supervisory status, the pre- and post-*Ellerth/Faragher* definitions are consistent. The power to hire or fire is a sign of supervisory status, but so is the power to assign work, which is clearly a condition of employment. See *Paroline v. Unisys Corp.*, 879 F.2d 100, 104 (4th Cir. 1989).

59. 524 U.S. at 807 (citations omitted). On this prong of the affirmative defense, the Court noted that plaintiff's unreasonable failure to make use of an employer-provided complaint procedure would usually be a sufficient showing but not the only way for defendants to meet this element of the defense. *Id.* at 807-08. As things have evolved after *Ellerth* and *Faragher*, however, many courts have granted summary judgments to defendants based solely on the defendant's meeting the first element of the defense, even though the plaintiff's timely use of defendant's procedures made it impossible for the defendant to meet the second element. See, e.g., *Reese v. Meritor Auto., Inc.*, No. 00-1604, 2001 U.S. App. LEXIS 3517 (4th Cir. Mar. 8, 2001); David Sherwyn et al., *Don't Train Your Employees and Cancel Your "1-800" Harassment Hotline: An Empirical Examination and Correction of the Flaws in the Affirmative Defense to Sexual Harassment Charges*, 69 FORDHAM L. REV. 1265 (2001). But see *Johnson v. West*, 218 F.3d 725, 731 (7th Cir. 2000) (requiring that defendant meet both prongs of the defense). Interestingly, the *Ellerth/Faragher* Court seemed ambivalent about whether the affirmative defense would forestall liability entirely, or whether it would have the lesser impact that affirmative defenses have sometimes recently had in the employment discrimination context: cutting off monetary damages, but still allowing the plaintiff to recover attorney's fees. The EEOC guidelines reflect this uncertainty. They provide: "When harassment by a supervisor creates an unlawful hostile environment but does not result in a [TEA], the employer can raise an affirmative defense to liability or damages, which it must prove by a preponderance of the evidence." EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (June 18, 1999), available at <http://www.eeoc.gov>.

Thus, absent the supervisor's taking a TEA against the victim, the employer may avert vicarious liability if it proves, by a preponderance of the evidence, its own reasonable care and the victim's lack thereof.⁶⁰

In Faragher's case, the Supreme Court concluded that the City of Boca Raton could not prevail on the affirmative defense.⁶¹ The City's sexual harassment policy and procedures had already been found as a factual matter to be utterly ineffective.⁶² In fact, the trial court had found a complete failure on the part of the City to disseminate its policy among lifeguards employed by the City.⁶³ The Court remanded Ellerth's case, by contrast, to allow Burlington Industries an opportunity to assert and prove the newly available affirmative defense.⁶⁴

The categories⁶⁵ of harassment after *Ellerth* and *Faragher*, and the concomitant standards for imputing liability to the employer are:

60. *Faragher*, 524 U.S. at 806-07. The Court cautioned that employers would not always need to prove the existence of harassment policies and complaint procedures, and that the existence of such a policy would not invariably excuse the employer. *Id.* at 807.

61. *Id.* at 808-09.

62. *Id.*

63. *Id.* at 808 (quoting trial court, *Fraghaer v. City of Boca Raton*, 864 F. Supp. 1552, 1560 (S.D. Fla. 1994)).

64. *Ellerth*, 524 U.S. at 766.

65. I include quid pro quo claims absent TEA with environmental claims under the assumption that the supervisor's proposal to base employment decisions on the victim's complicity in sexual demands necessarily constitutes an instance severe enough to be actionable as hostile environment harassment. See Steven H. Aden, "Harm in Asking": A Reply to Eugene Scalia and an Analysis of the Paradigm Shift in the Supreme Court's Title VII Sexual Harassment Jurisprudence, 8 TEMP. POL. & CIV. RTS. L. REV. 477, 498-499 (1999) (describing harm that accrues from threats to condition employment decisions on victim's engaging in sex even without actuation of threatened event). But see *Jones v. Clinton*, 990 F. Supp. 657, 676 (E.D. Ark. 1998) (finding no hostile work environment).

POST-*ELLERTH*

TYPE OF CLAIM	TEA	HOSTILE ENVIRONMENT
<i>Facts Typically Giving Rise to Claim</i>	Supervisor ⁶⁶ hires, fires, otherwise takes direct (often economic) action against the victim in connection with harassment, including fulfilling quid pro quo threats. ⁶⁷	Supervisor engages in harassment so severe or pervasive ⁶⁸ that it creates an abusive working environment and alters the terms, conditions or privileges of the victim's employment ⁶⁹ —including unfulfilled threats.
<i>Standard for Holding Employer Liable for Acts of Supervisor</i>	Employer is liable without a showing of negligence for supervisor harassment; no affirmative defense available (i.e., rule of uniform imputation).	Employer is liable without a showing of negligence for supervisor harassment, but affirmative defense is available.

Courts' analysis of vicarious liability for supervisor harassment now should proceed in accordance with the following flow chart:

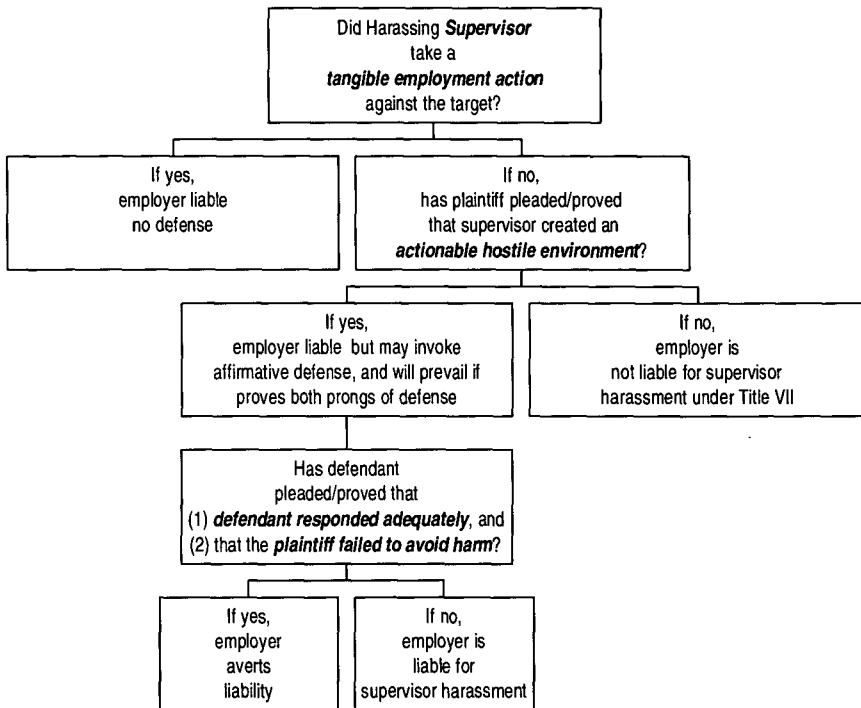
66. Only supervisors are capable of TEA's. It has sometimes been argued that supervisors should be defined as those who are empowered to take TEA against their subordinates, and that the term should not encompass those whose supervisory powers are of a lesser scale. *See Blackman, supra* note 58.

67. It is not clear what the standard is for the supervisor's rewarding an employee who submits to the sexual demands. It is also not clear what the standard for employer liability is for the constructive discharge of the employee. Ellerth, who allegedly resigned her position because of the harassment, would probably have been a candidate for a constructive discharge claim if she had alleged that the harassment made conditions so intolerable that she had no choice but to leave. She did not allege precisely that, however; so when the *Ellerth* Court states that "Ellerth has not alleged she suffered a tangible employment action at the hands of Slowik," the Court is not precluding the possibility that she might have done so. *See* 524 U.S. at 766.

68. Arguably, the harasser's status as a supervisor means that a threat of retaliation for failure to submit to a sexual advance is by definition severe.

69. *Faragher*, 524 U.S. at 786 (quoting *Meritor*, 477 U.S. at 67). Even though unfulfilled threats of retaliation for refusal to submit to advances can no longer invoke the rule of uniform imputation, the presence of such threats should be sufficient to establish that the environmental harassment is severe. The supervisor's deliberate use of delegated authority to attempt to extract sex from a subordinate employee goes to the heart of the sort of discriminatory use of authority that Title VII prohibits.

FLOW CHART⁷⁰
 EMPLOYER LIABILITY FOR SUPERVISOR'S HARASSMENT
 WHEN IS THE EMPLOYER VICARIOUSLY LIABLE FOR SUPERVISORS'⁷¹
 HARASSMENT OF SUBORDINATE EMPLOYEES?



In the wake of *Ellerth/Faragher*, characterizing a sexual harassment case as TEA is usually dispositive.⁷² Theoretically, of course, a

70. Judge Tom Stagg, Senior District Judge of the Western District of Louisiana, posited a similar flow-chart or "roadmap," which was included as an appendix to the Fifth Circuit opinion in *Casiano v. AT&T Corp.*, 213 F.3d 278, 288 (5th Cir. 2000). The *Casiano* schema has the disadvantage of suggesting that the only harassment TEA's that fall under the rule of uniform imputation are those in which the supervisor takes the action against the employee because of how the employee responded to the harassment. See *id.* at 285; compare *id.* with Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1689 (1998) (arguing that courts erroneously exclude from coverage nonsexualized sexual harassment). In fact, the *Casiano* chart even expressly limits the TEA category to quid pro quo cases without mention of those TEA cases that are not quid pro quo but simply environmental harassment culminating in the TEA. 213 F.3d at 288.

71. Courts disagree on the issue of who is a supervisor for these purposes. See Blackman, *supra* note 58, at 125 (discussing disagreement).

72. See, e.g., *Casiano*, 213 F.3d 278. The ramifications of the *Ellerth/Faragher* decisions extend beyond harassment doctrine. Courts and commentators have suggested that the affirmative defenses should be made available in retaliation and other non-harassment. See, e.g., Linda M. Glover, *Title VII section 704(a) Retaliation Claims: Turning a Blind Eye Toward*

finding that harassment encompassed no TEA against the plaintiff simply permits the employer to invoke the defense, but indicates nothing about whether the employer will meet its burden of persuasion on both elements. In practice, however, decisional law since *Ellerth* and *Faragher* demonstrates that defendants permitted to invoke the defense generally win their cases. Two studies of harassment cases decided after the *Ellerth/Faragher* decisions reveal an overwhelming tendency for employers to win on the affirmative defense.⁷³ The studies looked at opinions on summary judgment motions in which employers “argued that a hostile-environment case should be dismissed because the employer satisfied, as a matter of law, the affirmative defense.”⁷⁴ The studies’ results suggest that courts operate under an unspoken presumption in favor of defendants on the affirmative defense, rather than against them as the burden of persuasion requires. The researchers concluded that many of the judicial opinions on the affirmative defense were result oriented. “[T]o reward an employer who responds adequately to a harassment complaint, courts often find that the complaining employee acted ‘unreasonably’ as a matter of law, even when such a determination may merit a more thorough review of the facts of the case.”⁷⁵ Plaintiffs who lose on the TEA issue, thus, generally lose their cases.

III. PROBLEMS IN DEFINITION

Despite arguments favoring a broad definition for the TEA concept, courts often err on the side of finding environmental harassment.⁷⁶ Because this mischaracterization allows defendants to

Justice, 38 Hous. L. Rev. 577, 581 n.21 (2001) (arguing that *Ellerth* affirmative defense should be available in retaliatory harassment cases brought under section 704 of Title VII).

73. See Sherwyn, *supra* note 59, at 1288 (study results indicate that employers prevail regardless of whether plaintiffs exercised reasonable care; employers won in a majority of cases in which defendants invoked affirmative defense on summary judgment); see also Ann Juliano & Stewart J. Schwab, *The Sweep of Sexual Harassment Cases*, 86 CORNELL L. REV. 548, 592 (2001) (study finds that employers with harassment policies in place general avoid liability).

74. See Sherwyn, *supra* note 59, at 1268–69.

75. *Id.* Compare *id.*, with Harper, *supra* note 55, at 46 (predicting that “placement of the burden of proof” on the defendant might prove “critical to the outcome of a case in which the trier of fact is uncertain about” either party’s reasonableness), and Harper, *supra* note 55, at 48 (“*Faragher-Ellerth* approach clarifies that when both the employer and the employee victim have acted reasonably, the costs of the discriminatory harassment are to be imposed on the employer.”).

76. There is no bright line between TEA and environmental cases, but rather a continuum. Cf. Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 834 (1991) (suggesting that the

invoke the affirmative defense, the ramifications are serious. Courts' readiness to conclude that there has been no TEA results at best in excessive litigation on the affirmative defense issues, and at worst (and quite frequently⁷⁷) in injustice for employees who are victims of TEA's but whose employers escape liability entirely under an affirmative defense not intended for such cases.

A major cause of the under-identification of TEA cases is courts' parsimonious definition of the TEA concept itself.⁷⁸ Some courts import constrictive doctrinal developments from other areas of Title VII, even where those developments do not logically fit the harassment context.⁷⁹ Other courts have relied on excerpts of the *Ellerth/Faragher* text taken out of context to define TEA more narrowly than the *Ellerth/Faragher* rationales in total would suggest.⁸⁰ Disagreement on the issue is understandable because the *Ellerth/Faragher* Court articulated a TEA standard that is inconsistent with the Court's underlying rationale, which itself contains internal inconsistencies.⁸¹ The *Ellerth/Faragher* rationale, moreover, bespeaks a definition much broader than that suggested by some of the examples the Court cites.⁸² Building on, or in tandem with,

distinction between quid pro quo and environmental harassment "takes the form of a continuum rather than a divide").

77. See Sherwyn, *supra* note 59, at 1285-86 (documenting courts' frequent finding that defendants have prevailed on the *Ellerth* defense, even where defendants fail to make any showing at all on the second prong of the defense).

78. Deficiencies in factual analysis may entail disaggregation. Courts treat situations that in the aggregate, amount to TEA harassment (usually constructive discharge) as a series of isolated occurrences, which appear trivial when viewed separately. See M. Isabel Medina *A Matter Of Fact: Hostile Environments and Summary Judgments*, 8 S. CAL. REV. L. & WOMEN'S STUD. 311, 341 (1999) (arguing that courts' disaggregation of claims and conduct results in courts' seldom finding instances of hostility sufficient to support actionable hostile environment claims). See, e.g., *Watkins v. Prof'l Sec. Bureau, Ltd.*, No. 98-2555, 1999 U.S. App. LEXIS 29841, at *13 (4th Cir. Nov. 15, 1999), *cert. denied*, 529 U.S. 1108 (2000) (finding no connection between harassment and plaintiff's termination despite causal relationship between two). Hostile environment sexual harassment analysis is similarly fraught with such "disaggregation."

79. See *Ribando v. United Airlines, Inc.* 200 F.3d 507, 510-11 (7th Cir. 1999) (relying on pre-*Ellerth* material adversity requirement to give content to *Ellerth* TEA standard).

80. See Harper, *supra* note 55, at 64.

81. See *id.* at 49 ("[T]he Court's use of common law agency principles was too formulaic, and its invocation of Title VII policy and precedent was too truncated to be either fully convincing or adequately explicative of the meaning of the structure to be applied to future difficult cases.").

82. In fact, different segments of the opinions suggest different rationales for the holdings. See *id.* Thus, the *Ellerth* opinion first suggests "looking to whether the discriminatory action had a 'significant' impact on the victim's employment status," second, it stresses that TEA's may be identified by virtue of the fact that they "fall within the special province of the supervisor," and finally that the TEA requires an official company act. See *id.* at 72 (quoting *Ellerth*, 524 U.S. at 761-62). Justice Souter's *Faragher* opinion does not cite cases, but does cite to the *Ellerth* decision, which cites cases. 524 U.S. at 807.

these ambiguities, lower courts have constricted the definition of TEA. The remainder of this Article considers five analytical methods that have yielded these constrictions in the TEA concept:

1. Importation into the harassment context of the “materially adverse” or “ultimate employment action” concepts with which some courts have curtailed discrimination claims outside the harassment context;
2. Focusing on a single item in the *Ellerth/Faragher* list of criteria to consider, to the exclusion of other countervailing factors;
3. Finding, in the *Ellerth/Faragher* realignment of categories, alterations of the standards operative within the categories;
4. Recognizing TEA’s only in cases in which the supervisor’s action against the plaintiff is in retaliation for the plaintiff’s declining the supervisor’s sexual advances, rather than in all cases in which harassment culminates in a TEA;
5. Superimposition of retaliation doctrine onto harassment analysis.

*A. Importation into the Harassment Context of the “Materially Adverse”
or “Ultimate Employment Action” Concepts, Which Some Courts
Have Imposed To Curtail Discrimination Claims
Outside The Harassment Context*

Despite robust criticism from legal scholars, heightened injury requirements have flourished in mainstream (non-harassment) discrimination cases, particularly retaliation cases, and are now migrating to the harassment context.⁸³ In three of the federal circuits,

83. *Ribando v. United Airlines, Inc.*, 200 F.3d 507, 511 (7th Cir. 1999) (relying on pre-*Ellerth* material adversity requirement to give content to *Ellerth* TEA standard); *Savino v. C.P. Hall Co.*, 199 F.3d 925, 932 (7th Cir. 1999) (TEA is akin to pre-*Ellerth* concept of adverse employment action). *But see* *Guillory v. S. Natural Gas Co.*, No. 99-2011, 2000 U.S. Dist. LEXIS 13171, at *5 (E.D. La. Sept. 6, 2000) (TEA is something less than an “ultimate employment decision”). The corollary is also at work. Some courts have imported into mainstream discrimination doctrine the TEA concept developed by the Court for the unique circumstance of harassment. *See* *Watson v. Norton*, No. 99-1450, 2001 U.S. App. LEXIS 4962, at *21 (10th Cir. Mar. 26, 2001) (citing *Ellerth* TEA definition to help define “adverse employment action” actionable under section 704 retaliation); *Evans v. Houston*, 246 F.3d 344, 353 (5th Cir. 2001) (citing *Ellerth* as demonstrative of requirements for

mainstream discrimination plaintiffs (those invoking sections 703 and/or 704 of Title VII) who succeed in proving they were victims of discrimination nevertheless lose their cases if they fail to meet these judicially imposed heightened injury requirements.⁸⁴ A court imposing such requirements insists that plaintiff prove that the action taken against her was "ultimate" or "materially adverse," in addition to discriminatory. To meet this requirement, the plaintiff usually must show that the challenged action formally altered her relationship with the employer,⁸⁵ whether by discharge, failure to hire,⁸⁶ transfer, or demotion.⁸⁷

showing adverse action under section 704); Shackelford v. DeLoitte & Touche, 190 F.3d 398, 407 (5th Cir. 1999) (citing *Ellerth* for proposition that Title VII covers only adverse employment actions); Jones v. Wright State Univ., No. 98-4041, 1999 U.S. App. LEXIS 24334, *3 (6th Cir. Sept. 28, 1999) (citing *Ellerth* for proposition that section 703 race and sex discrimination plaintiff must allege material adverse employment action); Boone v. Goldin, 178 F.3d 253, 255 (4th Cir. 1999) (citing *Ellerth* for the proposition that Title VII, in general, limits liability to cases of TEA). The latter migration poses similar threats to thwart the protections embodied in Title VII.

84. See *Johnson v. Booker T. Washington Broad. Serv. Inc.*, 234 F.3d 501, 512 (11th Cir. 2000); *Savino v. Hall*, 199 F.3d 925, 933 n.8 (7th Cir. 1999); *Ledergerber v. Stangler*, 122 F.3d 1142 (8th Cir. 1997); *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707-08 (5th Cir. 1997); *Spring v. Sheboygan Area Sch. Dist.*, 865 F.2d 883, 885 (7th Cir. 1989); *Dorsch v. L.B. Foster Co.*, 782 F.2d 1421, 1424 (7th Cir. 1986); *Page v. Bolger*, 645 F.2d 227, 233 (4th Cir. 1981). See generally Ernest F. Lidge III, *The Meaning of Discrimination: Why Courts Have Erred in Requiring Employment Discrimination Plaintiffs to Prove That the Employer's Action Was Materially Adverse or Ultimate*, 47 U. KAN. L. REV. 333, 348 (1999). But cf. *Fierros v. Tex. Dep't of Health*, 274 F.3d 187, 194 (5th Cir. 2001) (denial of pay increase constitutes adverse action for purposes of section 704). Although the terms, "ultimate," and "materially adverse," may have slightly different connotations, they share for present purposes that meaning that the plaintiff must show a formal and harmful alteration in her worklife. Professor Rebecca White has observed an increasing trend to impose such heightened harm requirements and suggested that the "trend may well be a reaction to the explosion of employment discrimination claims crowding the dockets of the federal courts." Rebecca Hanner White, *De Minimis Discrimination*, 47 EMORY L.J. 1121, 1124 (1998); see also *id.* at 1126 (discussing confusion among courts on whether and what severity of harm is required to meet the statutory elements of a discrimination claim and to create and inference sufficient to make a prima facie case of intent); Anne Henry, *Employer and Employee Reasonableness Regarding Retaliation under the Ellerth/Faragher Affirmative Defense*, 1999 U. CHI. LEGAL F. 553, 566 (1999) (noting that Seventh, Eleventh, and D.C. Circuits have relied on absence from section 704 retaliation provision of language restricting adverse actions to those enumerated in section 703); Eric M.D. Zion, Note, *Overcoming Adversity: Distinguishing Retaliation from General Prohibitions Under Federal Employment Discrimination Law*, 76 IND. L.J. 191, 194 (2001) ("majority of circuits do not restrict section 704(a)'s language to such a reading but instead include lesser adverse actions with some minimum level of substantiality").

85. Cf. *Savino v. Hall*, 199 F.3d 925, 932 n.8 (7th Cir. 1999) (requiring that employment action "cause a substantial detriment to the plaintiff's employment relationship" in order to qualify as TEA); *Mattern v. Eastman Kodak*, 104 F.3d 702, 708 (5th Cir. 1997) (defining adverse action to include hiring, granting leave, discharging, promoting and compensating).

86. Discriminatory failure to hire, of course, maintains a status quo that nondiscriminatory decisionmaking might have altered.

87. Courts have imposed similarly heightened requirements entitled "adverse action" and "materially adverse action," which have the same general effect of destroying otherwise

The circuits have split on what kind of action is sufficiently severe or important to violate section 704.⁸⁸ Some courts, such as the Fifth Circuit in the case of *Mattern v. Eastman Kodak*,⁸⁹ have restricted section 704 claims to "ultimate employment actions," such as firing and denial of promotion.⁹⁰ Such restrictive cases represent the view of only a minority of federal circuits.⁹¹ The Fourth, Fifth and Eighth Circuits have imposed the ultimate harm requirement barrier to plaintiffs' retaliation claims.⁹² Other circuits recognize

valid Title VII claims. Lidge, *supra* note 84, at 368-73. Professor Lidge writes: "courts have used the adverse action requirement to impose an additional substantive requirement on plaintiffs. In doing so, they have rewritten the statute." *Id.* at 372-73; *see also* Melissa A. Essary & Terence D. Friedman, *Retaliation Claims Under Title VII, the ADEA, and the ADA: Untouchable Employees, Uncertain Employers, Unresolved Courts* 63 Mo. L. REV. 115, 152 (1998) (noting that Title VII language not restricted to ultimate decisions). In *Employer and Employee Reasonableness Regarding Retaliation under the Ellerth/Faragher Affirmative Defense*, Ann Henry argues that the requirement of some courts that plaintiff suffer an "ultimate" employment action to bring a 704 retaliation claim conflicts with the *Ellerth/Faragher* requirement that the victim use the employer's channels to report the environmental harassment. Henry, *supra* note 84, at 554-55.

88. *See* Ray v. Henderson, 217 F.3d 1234, 1243 (9th Cir. 2000) (describing split in circuits: Fifth and Eight Circuits recognize only ultimate employment actions as cognizable under section 704; First, Seventh, Ninth, Eleventh, and D.C. Circuits take expansive view of adverse employment actions; Second and Third take intermediate position); *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1456 (11th Cir. 1998) (describing split in the circuits: Eighth and Fifth circuits limit retaliation claims to ultimate employment actions, while First, Ninth, and Tenth allow retaliation claims for actions falling short of ultimate employment actions); White, *supra* note 84, at 1142-45.

89. 104 F.3d 702, 708 (5th Cir. 1997).

90. *Walker v. Glasfloss*, 214 F.3d 615, 629 (5th Cir. 2000) (requiring that adverse employment actions be "ultimate" in order to be cognizable under section 704 of Title VII). Professor Rebecca White traces the problem to the Fourth Circuit's reliance on language contained in a separate section of Title VII (section 717, which governs the federal government as employer) to decide on the meaning of the very different language in the section 704 prohibition against discrimination. *See* White, *supra* note 84, at 1136-41. It is ironic that the ultimate employment decision requirement that migrated from section 717 through section 704 and now to section 703 harassment, was imposed by the Fifth Circuit because, in its view, section 703(a)(1) excludes the "vague harms" contemplated in section 703(a)(2). *Mattern*, 104 F.3d at 707-08. The "terms and conditions of employment" described in section 703(a)(1) are precisely the bases for the Supreme Court's *Meritor* conclusion that hostile environment harassment is actionable under Title VII. Clearly, section 703(a)(1) is not limited to ultimate employment actions. *See generally* Lidge, *supra* note 84, at 358-68.

91. *See* Ray v. Henderson, 217 F.3d at 1243 (only Fifth and Eighth circuits limit retaliation claims to ultimate employment actions); *Burger v. Cent. Apartment Mgmt., Inc.*, 168 F.3d 875, 878 n.3 (5th Cir. 1999) (noting that strict ultimate employment action standard of the Fifth Circuit is minority position in Federal Circuit courts); *Wideman*, 141 F.3d at 1456 (only Fifth and Eighth circuits limit retaliation claims to ultimate employment actions).

92. *See* *Cottman v. Rubin*, No. 01-1545, 2002 U.S. App. LEXIS 8635, at *6 (4th Cir. May 3, 2002) (no retaliation claim absent ultimate employment action); *Mattern*, 104 F.3d at 707 ("Title VII was designed to address ultimate employment decisions, not to allow every decision that might have some tangential effect upon those ultimate decisions" (quoting *Dollis v. Rubin*, 77 F.3d 777, 781-82 (5th Cir. 1995))); *Munday v. Stangler*, 126 F.3d at 239, 243 (8th Cir. 1997) (Title VII applies to discrimination only if it affects an ultimate employment decision) (citing *Harlston v. McDonnell Douglas Corp.*, 37 F.3d 379, 382 (8th Cir. 1994));

that Title VII protects against employment discrimination in all its many guises.⁹⁵ These courts have allowed section 704 claims for the full spectrum of retaliatory behaviors, regardless of whether those behaviors rose to the level of "ultimate employment actions."⁹⁴ Thus, the Eleventh Circuit, in *Wideman v. Wal-Mart Stores, Inc.*, found a cognizable adverse employment action when plaintiff's manager "reprimanded her, delayed authorizing medical treatment, and asked co-workers to give negative statements about the plaintiff."⁹⁵

The ultimate harm requirement conflicts with the language of Title VII and with Supreme Court precedent.⁹⁶ The language of section 704, prohibiting retaliation against those seeking to enforce rights under Title VII, simply makes it "an unlawful employment practice for an employer to *discriminate*" on the basis of an employee's opposing practices that violate Title VII or participating in procedures to challenge such practices.⁹⁷ Yet the leading appellate court decision requiring ultimate action, the Fifth Circuit's *Mattern v. Eastman Kodak* decision read the term "discriminate" to require that the employer's retaliatory act consist of an "ultimate employment decision," rather than "an 'interlocutory

Hopkins v. Baltimore Gas & Elec. Co., 77 F.3d 745, 755 (4th Cir. 1996) (stating that absent discharge, there is insufficient adverse action to support retaliation claim); see Elana Olson, *Beyond the Scope of Employer Liability: Employer Failure to Address Retaliation by Co-Workers After Title VII Protected Activity*, 7 WM. & MARY J. OF WOMEN & L. 239, 258 (2000).

93. See *Wideman*, 141 F.3d at 1456 (citing *Wyatt v. City of Boston*, 35 F.3d 13, 15-16 (1st Cir. 1994); *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 984-86 (10th Cir. 1996)); *Yartsoff v. Thomas*, 809 F.2d 1371, 1375 (9th Cir. 1987)); Olson, *supra* note 92, at 258.

94. See, e.g., Henry, *supra* note 84, at 566 n.64 (describing cases that recognize retaliation claims in absence of ultimate employment action).

95. Ann M. Henry, *Employer and Employee Reasonableness Regarding Retaliation under the Ellerth/Faragher Affirmative Defense*, 1999 U. CHI. LEGAL F. 553, 562 (1999); see *Wideman*, 141 F.3d at 1456 (citing *Wyatt*, 35 F.3d at 15-16; *Berry v. Stevinson Chevrolet*, 74 F.3d at 984-86; *Yartsoff v. Thomas*, 809 F.2d at 1375); Olson, *supra* note 92, at 258.

96. See *Wideman*, 141 F.3d at 1456 (plain language of section 704 imposes no ultimate employment action requirement).

97. In pertinent part, section 704 states:

It shall be an unlawful employment practice for an employer to *discriminate* against any of his employees . . . because [the employee] has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a) (emphasis added).

Some authors have argued that the lack of qualifier in this text renders actionable a broader range of employer acts than are actionable under section 703. See Zion, *supra* note 84, at 198; cf. Essary & Friedman, *supra* note 87, at 141 ("anti-retaliation provision, which is not limited to a specific definition, as is the substantive discrimination provision, may be construed more broadly than the substantive anti-discrimination provisions").

or mediate' decision which can lead to an ultimate decision."⁹⁸ The *Mattern* court drew this conclusion largely from identical language in section 703, which is the statute's general prohibition against discrimination.⁹⁹ The *Mattern* court distinguished between the two essential elements of section 703. One prohibits all discrimination in employment decisions, including those pertaining to compensation, terms, conditions and privileges of employment; the other forbids limiting, segregating, or classifying workers in a way that tends to deprive an individual of opportunities or adversely affect employment status.¹⁰⁰

The Fifth Circuit's *Mattern* decision relied on the distinctions between these two subsections of section 703 to justify an insupportable reading of section 704. To define the term, "discriminate" in section 704, the *Mattern* court looked to the use of that term in section 703(a)(1).¹⁰¹ The court concluded that the term "discriminate" in section 703(a)(1) is much narrower than section 703 (a)(2)'s language "limiting employees in ways that *tend* to deprive them of opportunities."¹⁰² The court then leaped to the conclusion that because "[t]he anti-retaliation provision[, like section 703(a)(1),] speaks only of "discrimination" [without mention] of the vague harms contemplated in [703](a)(2), [section 704

98. *Mattern*, 104 F.3d at 708. *Mattern* is one of the earliest and most significant circuit court decisions to impose an ultimate employment requirement. The *Mattern* court drew upon two earlier decisions, neither of which squarely stood for the proposition that section 704 retaliation claims are limited to ultimate employment actions. One was the Fourth Circuit case of *Page v. Bolger*, 645 F.2d 227 (4th Cir. 1981), which construed the term "personnel action" in section 717 of Title VII (governing suits against the federal government) to mean ultimate employment action. *Id.* at 233. The other was the Fifth Circuit's own earlier decision in *Dollis v. Rubin*, 77 F.3d 777 (5th Cir. 1995), which relied on *Page* to require ultimate employment actions to challenge a federal personnel action under section 717.

99. 104 F.3d at 708-09.

100. 42 U.S.C. § 2000e-2.

(a) It shall be an unlawful employment practice for an employer —

- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
- (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's color, religion, sex, or national origin.

Id.

101. 104 F.3d at 708-09.

102. *Id.*

must] be read to exclude such vague harms, and to include only ultimate employment decisions.”¹⁰³

The problem with the court relying on section 703(a)(1) in this way is that section 703(a)(1) itself does not in any way limit actionable claims to ultimate employment actions. In fact, the Supreme Court rejected precisely this narrowing construction of section 703(a)(1) in its 1986 *Meritor* decision. When the *Meritor* Court recognized that section 703(a)(1) allows a claim for hostile environment harassment, it expressly rejected the argument that section 703(a)(1) imposes any ultimate decision requirement,¹⁰⁴ concluding that: “[T]he language of Title VII is not limited to “‘economic’” or “‘tangible’” discrimination. The phrase “‘terms, conditions, or privileges of employment’” evinces a congressional intent “‘to strike at the entire spectrum of disparate treatment of men and women’” in employment.”¹⁰⁵

The language of the statute, as construed by the Supreme Court, thus imposes no limits on actionability of discrimination under section 703(a)(1), as long as the discrimination affects a term, condition, or privilege of employment, which need not be of economic or ultimate consequence, but may instead be “merely” environmental or mediate.¹⁰⁶ Given the absence from the statutory

103. *Id.*

104. 477 U.S. 57, 58 (1986) (citing *Los Angeles Dep’t of Water and Power v. Manhart*, 435 U.S. 702 (1978)).

105. *Id.* at 64. The statute and legislative history do not define the term “discrimination.” 42 U.S.C. § 2000e-1; Robert Brookins, *A Rose By Any Other Name . . . The Gender Basis Of Same-Sex Sexual Harassment*, 46 DRAKE L. REV. 441, 499 (1998). In *Faragher*, the Court stated:

We have repeatedly made clear that although the statute mentions specific employment decisions with immediate consequences, the scope of the prohibition “‘is not limited to “economic” or “tangible” discrimination,”” *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993) (quoting *Meritor*, 477 U.S. at 64), and that it covers more than “‘terms’ and ‘conditions’ in the narrow contractual sense.” *Oncala v. Sundowner Off-shore Services, Inc.*, 523 U.S. 75, 78 (1998).

524 U.S. at 786.

106. On the meaning of the term “discrimination, Professor Gudell has written:

Title VII does not define “discrimination.” However, it does provide that only certain kinds of discrimination are unlawful—namely, those engaged in “because of” one of the bases specified in the Act. One must understand “discrimination,” then, despite its normally pejorative connotation, as a neutral term in Title VII. Discrimination simply means treating some employees differently from others. Of course, employers treat some employees differently from others every day—some are fired while others are not, some are promoted or given raises while others are not, some applicants are hired while others are turned away. None of these “discriminations” are illegal. The only illegal discriminations are those made “because of” race, color, religion, sex, or national origin. Therefore, the entire task of elaborating the substantive reach of

text of any heightened harm restrictions and the Supreme Court's express rejection of the heightened harm requirements, the lower courts' persistence in imposing such requirements is bizarre. It is not surprising, therefore, that legal scholars have consistently argued against heightened harm requirements.¹⁰⁷

Perhaps the most telling evidence that section 704 retaliation claims are not limited to ultimate actions is implicit in the Supreme Court's 1997 decision in *Robinson v. Shell Oil*.¹⁰⁸ In *Robinson*, the Court confronted the question of whether section 704 reaches retaliation against former employees. The plaintiff in *Robinson*, a former Shell Oil employee, alleged that Shell Oil retaliated against Robinson after the termination of Robinson's employment, by giving a negative reference in connection with Robinson's application for a position with a different employer.¹⁰⁹ The Supreme Court held that a current employer-employee relationship between the plaintiff and the defendant is not a prerequisite to a retaliation claim under section 704. Because the negative impact of retaliation in post-employment cases like Robinson's necessarily is on the plaintiff's employment relationship with a potential future employer, rather than with the defendant, section 704 necessarily encompasses retaliatory measures that do not *in the least* affect

Title VII—the task of determining exactly which actions violate the statute and which do not—hinges upon the interpretation of the phrase “because of.”

Paul J. Gudel, *Beyond Causation: The Interpretation of Action and the Mixed Motives Problem in Employment Discrimination Law*, 70 TEX. L. REV. 17, 21–22 (1991).

107. See generally Ernest Lidge, *supra* note 84, and Rebecca Hanner White, *supra* note 84. Cf. Essary & Friedman, *supra* note 87, at 135–37. Essary & Friedman note that:

[C]ourts employing the strict ultimate employment decision standard, have relied expressly on the Fourth Circuit's decision in *Page v. Bolger* as the genesis of their holdings. However, these courts' exclusive reliance on *Page* is misplaced, most fundamentally so because *Page* simply did not concern an anti-retaliation clause. Rather, *Page* addressed a plaintiff's attempt to rewrite the prima facie case requirements in a failure-to-promote case brought under 42 U.S.C.A. § 2000e-16(a), a particular section of Title VII which deals only with discrimination in federal employment and which itself requires that there be a “personnel action,” not merely “discrimination.”

Id. at 135–36 (citations omitted).

108. 519 U.S. 337 (1997); see Joel Kravetz, *Deterrence v. Material Harm: Finding the Appropriate Standard to Define an “Adverse Action” in Retaliation Claims Brought Under the Applicable Equal Employment Opportunity Statutes*, 4 U. PA. J. LAB. & EMP. L. 315, 363–64 (2002) (relying on Robinson in argument that section 704 adverse employment action should receive broad construction).

109. *Robinson*, 519 U.S. at 338.

(ultimately or otherwise) the relationship between the defending employer and the plaintiff-employee.¹¹⁰

By definition, the ultimate employment action requirement is inconsistent with *Robinson*. In setting forth the specifics of the ultimate action requirement, the *Mattern* court stated that "Title VII's anti-retaliation provision refers to ultimate employment decisions, and not to an 'interlocutory or mediate' decision which can lead to an ultimate decision."¹¹¹ A negative reference or any other negative action by a former employer cannot constitute an ultimate decision, inasmuch as the former employer has no power to take ultimate action against someone no longer on its payroll. One district court in the Fifth Circuit, the source of the *Mattern* ultimate action requirement, construed the ultimate requirement in combination with the *Robinson* rule to permit former employees to sue their former employers for retaliation only if the retaliatory act would affect prospective future employers' ultimate decisions about that employee.¹¹² This lower court concluded that a negative reference letter sent in retaliation for plaintiff's protected acts did not amount to an adverse employment action cognizable under section 704 because the letter did not result in the potential employer taking ultimate action against the plaintiff.¹¹³ The district court's valiant effort to reconcile *Mattern* and *Robinson* was destined to fail because *Mattern* forbids retaliation suits for mediate actions, and a former employer's action is necessarily mediate, capable of harming the plaintiff only by influencing a decision by the future employer.¹¹⁴

110. See *Bernofsky v. Tulane Educ. Fund*, No. 98-1792, 2000 U.S. Dist. Lexis 5561, at *16-19 (E.D. La. April 18, 2000) (suggesting that Fifth Circuit should revisit the *Mattern* rule in light of *Robinson*). But see *Forde v. Brinker Rest. Corp.*, No. 3:96-CV-1994-D, 1998 U.S. Dist. LEXIS 6277, at *6 n.2 (N.D. Tex. Apr. 19, 1998) (rejecting argument that *Robinson* should alter the *Mattern* requirement that retaliation plaintiffs show ultimate employment action).

111. *Mattern*, 104 F.3d at 708 (emphasis added).

112. *Bernofsky*, 2000 U.S. Dist. Lexis 5561, at *16-19.

113. *Id.* But see *Hecht v. GAF Corp.*, 95 Civ. 10379 (RPP), 1999 U.S. Dist. LEXIS 5946, at *10 (S.D.N.Y. Apr. 28, 1999) (when EMPLOYER has refused to provide a reference, it would be a fool's errand to require plaintiff to show exactly how further adverse job consequences—i.e., impediments to obtaining future employment—were affected by this refusal). The *Bernofsky* court tempered the *Robinson* rule that the no-longer employed may sue their former employers with the *Mattern* rule that only ultimate employment actions can give rise to retaliation claims by requiring that the plaintiff show that the adverse action affected an ultimate employment decision in connection with future employment for which the plaintiff was applying. The *Bernofsky* court also suggested, however, that the Fifth Circuit could profitably revisit the *Mattern* decision, with an aim to easing the ultimate employment action requirement. 2000 U.S. Dist. LEXIS 5561, at *18.

114. In fact, a court's finding actionable harm by virtue of the effect of discrimination on a plaintiff's relationship with an employer other than the defendant is not entirely without precedent. See *Sibley Memorial Hospital v. Wilson*, 488 F.2d 1338, 1341 (D.C. Cir. 1973)

The EEOC Compliance Manual also rejects heightened harm requirements:

Some courts have held that the retaliation provisions apply only to retaliation that takes the form of ultimate employment actions. Others have construed the provisions more broadly, but have required that the action materially affect the terms, conditions, or privileges of employment.

The Commission disagrees with those decisions and concludes that such constructions are unduly restrictive. The statutory retaliation clauses prohibit any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity. Of course, petty slights and trivial annoyances are not actionable, as they are not likely to deter protected activity. More significant retaliatory treatment, however, can be challenged regardless of the level of harm. As the [N]inth Circuit has stated, the degree of harm suffered by the individual "goes to the issue of damages, not liability."¹¹⁵

Critics contend that heightened harm requirements confuse the elements of the statutory cause of action with the elements of the *McDonnell Douglas*¹¹⁶ prima facie case, a proof structure that was devised for cases in which the plaintiff lacks direct evidence of motive or intent.¹¹⁷ Professor White has argued, for example, that the materiality or ultimate employment action requirement is not appropriate when injected as an element of the statutory claim, but may be appropriate in cases where the plaintiff is using circumstantial evidence under *McDonnell Douglas* to create an inference of

(by using term "person aggrieved," rather than "employee," statute extends beyond employer-employee relationships).

115. 115 EEOC Compliance Manual (CCH) § 8, 146 (1998) (citations omitted).

116. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)

117. See *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 250 (9th Cir. 1997) ("*McDonnell Douglas/Burdine* elements irrelevant if plaintiff advances direct evidence of discrimination."); Lidge, *supra* note 84, at 348; White, *supra* note 84 at 1142-45; see also *Kormoczy v. United States Dep't of Hous. and Urban Dev.*, 53 F.3d 821, 824 (7th Cir. 1995) ("Where direct evidence is used to show that a housing decision was made in violation of the statute, the burden shifting analysis is inapposite."); *Lowe v. City of Monrovia*, 775 F.2d 998, 1006 (9th Cir. 1985) ("plaintiff can establish a prima facie case of disparate treatment without satisfying the *McDonnell Douglas* test."); *Wooten v. Acme Steel Co.*, 986 F. Supp. 524, 527 (N.D. Ill. 1997) (distinguishing between statutory elements and *McDonnell Douglas* prima facie case); Frank Lopez, *Using the Fair Housing Act to Combat Predatory Lending*, 6 GEO. J. ON POV. L. & POL'Y 73, 99 n.201 (stating that the "validity of a fair housing complaint should be judged by the statutory elements of an FHA claim rather than the structure of the prima facie case").

discriminatory intent or motive. Under *McDonnell Douglas*, courts give such plaintiffs the benefit of the doubt, permitting an inference of discriminatory intent in the absence of direct evidence, but only if the action in question is sufficiently adverse or ultimate to look suspicious. The differences between the statutory elements and the *McDonnell Douglas* elements are significant, as are the ramifications of the plaintiff's proving them.¹¹⁸ The *McDonnell Douglas* proof scheme goes only to the statutory element of intent.¹¹⁹ The statutory elements, once proven, entitle the plaintiff to relief, unless the defendant proves, by a preponderance of the evidence, all of the elements of an affirmative defense.¹²⁰ Thus, as a rule the plaintiff who proves the elements of the statutory claim, wins her case. Under *McDonnell Douglas*, by contrast, the plaintiff's proof of the prima facie elements simply shifts to the defendant a burden of production to introduce evidence of a legitimate nondiscriminatory reason for the adverse action. The heightened harm requirements may be legitimate elements of proof for plaintiffs who wish to take advantage of the *McDonnell Douglas* presumption because they lack direct evidence of discriminatory motive, but they should not be injected as statutory elements for plaintiffs who are not invoking the *McDonnell Douglas*

118. *Gilligan*, 108 F.3d at 249; see also *Latimore v. Citibank Fed. Sav. Bank*, 151 F.3d 712, 715 (7th Cir. 1998) (stating that "[i]t is always open to a plaintiff in a discrimination case to show in a conventional way, without relying on any special doctrines of burden-shifting, that there is enough evidence, direct or circumstantial, of discrimination to create a triable issue."); *Ring v. First Interstate Mortgage, Inc.*, 984 F.2d 924, 926 (8th Cir. 1993). The failure to plead the *McDonnell Douglas* prima facie case does not mean that the plaintiff would be unable to advance direct evidence of discrimination, in which case the prima facie case is irrelevant. *Gilligan* 108 F.3d at 250. The *McDonnell Douglas* case simply allows a plaintiff who lacks direct evidence of discriminatory motive to avoid summary judgment or judgment as a matter of law. If plaintiff proves the elements of the *McDonnell Douglas* prima facie case, she avoids summary judgment or judgment as a matter of law on the issue of intent, forcing the defendant to put in its case. Defendant can neutralize the *McDonnell Douglas* prima facie case by producing evidence of a legitimate nondiscriminatory reason. *McDonnell Douglas* 411 U.S. at 802.

119. The plaintiff's proving the elements of the *McDonnell Douglas* prima facie case has the effect not merely of permitting the inference that the defendant was motivated by discrimination, but actually establishes "a legally mandatory, rebuttable presumption" that the defendant was so motivated. *O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 312 (1996); *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253-56 (1981).

120. The only statutory affirmative defense to intentional discrimination under Title VII is the bona fide occupational qualification defense. See *Int'l Union v. Johnson Controls*, 499 U.S. 187, 201 (1991). Defendant may also reduce its monetary liability by proving that it would have made the same decision in the absence of the discriminatory motive, 42 U.S.C. § 2000e, or by demonstrating that, after-acquired evidence would have caused it to make the same decision if it had known. *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 362-63 (1995). In the harassment context, of course, the *Ellerth/Faragher* decisions have added the affirmative defense, which does not undo the fact of the violation, but exempts the employer from remedying it.

are not invoking the *McDonnell Douglas* presumption.¹²¹ It is especially inappropriate for courts to add such extra hurdles under statutes whose remedial nature calls for liberal construction. Court activism to give access to statutory protection is consistent with statutory purpose. Court activism to curtail access is not.

If heightened harm requirements are unfounded, then arguments importing the heightened harm requirements whole cloth to give content to the TEA concept are similarly flawed.¹²² Despite critiques, courts that have adopted heightened harm requirements in retaliation cases under section 704 have begun to adopt the requirement in TEA analysis under section 703, as well.¹²³

Admittedly, arguments can be made that, wrong as such heightened harm requirements may be in the straight Title VII context, they are—for some reason—proper in defining TEA's in the discrete context of determining availability of the *Ellerth/Faragher* affirmative defense for harassment cases. As discussed below, however, the language of *Ellerth/Faragher* counsels against importing heightened harm doctrine into harassment jurisprudence. Courts that subscribe to the heightened harm requirement (and some that do not) understandably have imported that concept into the TEA context.¹²⁴ Indeed, Justice Kennedy's *Ellerth* opinion cited, though declined to approve the results in, several cases in which courts had imposed heightened harm requirements.¹²⁵ Justice Souter's *Faragher* opinion, though referring with approval to the *Ellerth* opinion, made no independent references to these stringent

121. See White, *supra* note 84, at 1142–45, 1171–82. Needless to say, standing doctrines protect against pursuit of claims involving no injury, and presumably require that plaintiffs show harm in order to proceed. Title VII, by its terms (by its silence, actually) leaves to the victim of discrimination to decide whether the effects hurt enough to warrant litigation. The scope of standing under Title VII is identical to that of Article III standing generally. W. Carl Jordan, *Employment Discrimination Law*, 1998 SUPP., A.B.A. SEC. LABOR & EMPLOYMENT L. 420 (citing cases); see also Lidge, *supra* note 84, at 348; White, *supra* note 84, at 1142–45, 1171–1182. Professor Lidge traces courts' misplaced reliance on precedent to develop a heightened harm requirement. He explains that courts' requiring a showing of material adversity confuses issues of how to prove intent with issues of statutory coverage. Professor Lidge has argued that the heightened harm requirements began simply as shorthand for the requirement in 703(a)(1) that the employer discriminate in the terms, conditions or privileges of employment, rather than as an independent requirement that plaintiff prove a certain degree of harm. Lidge, *supra* note 84, at 348.

122. Cf. *Watts v. Kroger Co.*, 170 F.3d 505, 510 n.5 (5th Cir. 1999) (declining to decide whether the *Ellerth* TEA and the *Mattern* ultimate employment action are equivalents).

123. See *Bernofsky*, 2000 U.S. Dist. Lexis 5561, at *16–19; *Reinhold v. Virginia*, 151 F.3d 172, 174–75 (4th Cir. 1998) (applying *Ellerth* to find no tangible employment action in the absence of ultimate alteration in job status the plaintiff).

124. *Ribando v. United Airlines, Inc.*, 200 F.3d 507, 511 (7th Cir. 1999) (relying on pre-*Ellerth* material adversity requirement to give content to *Ellerth* TEA standard).

125. 524 U.S. 742, 761 (citing *Crady v. Liberty Nat'l Bank & Trust Co.*, 993 F.2d 132, 136 (7th Cir. 1993), and other cases limiting the scope of Title VII).

appellate court cases.¹²⁶ In fact, however, both the language and rationale of the *Ellerth/Faragher* decisions counsel against heightened harm as a test for whether the supervisor's act is a TEA.

The language of the opinions includes an articulation of factors for identifying TEA's that suggests a definition far broader than merely ultimate employment actions. In particular, the Court, in listing factors relevant to the TEA assessment, stated that neither causation of economic harm nor report to and review by higher management, constituted necessary conditions to an action being a TEA.¹²⁷ Yet, economic harm and reporting to upper management are the hallmarks of the ultimate employment action concept. If an employment action can qualify as a TEA without having economic consequences and without being reported to upper management, then employment actions need not be ultimate in order to be TEA's.

Like the *Ellerth/Faragher* textual description of the concept, the Court's underlying rationale suggests that the TEA concept encompasses far more than ultimate employment actions. The *Ellerth/Faragher* Court viewed its overarching task to be the integration of agency law principles with the objectives of Title VII in the development of a standard for employer liability for harassment.¹²⁸ The Court began by considering each of the potential grounds for vicarious liability set forth in RESTATEMENT OF THE LAW OF AGENCY § 219.¹²⁹ Of the RESTATEMENT subsections at issue, the Court viewed two as potentially applicable to imputation of supervisor harassment to the employer: "within the scope of employment" and "aided by the agency relationship."¹³⁰ The Court gave two reasons for selecting the latter in preference to the former: (1) agency law is not consistent on the issue of whether harassment is or is not within the scope of employment, so would give no answer anyway; and (2) if harassment (which certainly appears in no job descriptions!) is within the scope of supervisor authority, it would also be within the scope of co-worker authority, and yet employers have never been vicariously liable for co-worker harassment in the absence of employer negligence.¹³¹ By contrast, the "aided by the

126. 524 U.S. at 808. In fact, Justice Souter includes in a list of TEA's "undesirable reassignment," along with discharge and demotion. *Id.*

127. *Ellerth*, 524 U.S. at 761.

128. *Faragher*, 524 U.S. at 802 n.3.

129. *Id.* at 793-804.

130. *Id.* at 793, 801.

131. *Faragher*, 524 U.S. at 799-802. The *Faragher* Court acknowledged that "supervisors have special authority enhancing their capacity to harass, and that the employer can guard against their misbehavior more easily because their numbers are by definition fewer than

agency relationship” prong of the RESTATEMENT Section 219 standard has the advantage of distinguishing between supervisor and co-worker harassers.¹³² While the agency relationship helps both supervisors and co-workers in the sense that it gives them proximity to the victim, it helps the supervisor more because:

[a]n employee generally cannot check a supervisor’s abusive conduct the same way that she might deal with abuse from a co-worker. When a fellow employee harasses, the victim can walk away or tell the offender where to go, but it may be difficult to offer such responses to a supervisor, whose “power to supervise—which may be to hire and fire, and to set work schedules and pay rates—does not disappear . . . when he chooses to harass through insults and offensive gestures, rather than directly with threats of firing or promises of promotion.”¹³³

In essence, the Court proceeded under the “aided by the agency relationship” standard because that standard can accommodate the crucial difference between supervisor and co-worker harassers. Although the agency relationship empowers both types of harassers, since both gain access to their victims by virtue of their jobs, only the supervisor is empowered to take employment actions against the victim, which power allows the supervisor (but not the co-worker harasser) to intimidate the subordinate into submitting to the harassment.¹³⁴ The *Ellerth/Faragher* Court thus selected the TEA as the critical indicator that the harasser was indeed “misusing supervisory authority” because it wanted to preserve the traditional rule that rejects strict liability for co-worker harassment.¹³⁵ Because supervisors (for whose harassment employers should be strictly liable) are, by definition, wielders of power that employers delegate to them to take legitimate TEA’s against subordinates and because co-equal employees by definition lack that power, the occurrence

the numbers of regular employees,” but “because of the virtues of categorical clarity,” chose to analyze the issue under the aided by the agency relationship standard. *Id.* at 800–01.

132. *Id.* at 803.

133. *Id.* at 803 (quoting Estrich, *supra* note 76, at 854).

134. The nature of the affirmative defense mirrors this foundation of the distinction between TEA and environmental liability. The affirmative defense is available in the environmental case because, in the words of the *Faragher* Court: “Whether the agency relation aids in commission of supervisor harassment which does not culminate in a TEA is less obvious.” *Id.* at 763.

135. *Id.* at 804.

of a TEA is a bright-line test for determining whether or not the harasser was aided by the agency relationship.¹³⁶

The *Ellerth/Faragher* Court defined TEA's as actions in which the supervisor necessarily employs powers delegated by the employer. A TEA thus is an action that only a supervisor has the power to take. If a co-equal employee could have done the deed, the deed does not qualify. This is the crux of the TEA definition. The Court drew the essential demarcation between TEA's and non-TEA/environmental cases in order to exclude co-worker harassment cases from the rule of uniform imputation. The key, then, is not so much the dimension of the action taken against the subordinate, but the source of the power the supervisor uses to take that action. If that power is derived from the authority the supervisor derives from his relationship with the employer, the action taken is a TEA, regardless of whether it alters the subordinate's status in an ultimate sense. If the power is nothing more than the power that any employee receives from being included in the workplace, then the action is not a TEA.

B. Focusing On A Single Item In The Ellerth/Faragher List of Criteria To Consider, Rather Than Considering All Factors

In *Ellerth/Faragher*, the Supreme Court identified qualities that characterize an act as a TEA. A TEA

1. "falls within the special province of the supervisor, [who] has been empowered by the company as a distinct class of agent to make economic decisions

136. The Court rejected a test that would have found the supervisor to have been aided by the agency relationship only where the supervisor expressly and affirmatively used delegated authority because it would under-identify TEA's. *Id.* at 805. The Court believed that such a test would fail to capture some instances in which supervisors were discrete enough that the fact that they were affirmatively using such power would be difficult to detect. *Id.* at 804. The tendency of courts and commentators to create or construe substantive employment discrimination law in ways that cut off protections for the express objective of avoiding burdens on courts and the EEOC is odd. Substantive employment discrimination rights are not luxuries to be curtailed when their protection is inconvenient any more than the criminal laws against drug-use or dealing are to be toned down because of court burdens. The *Faragher* Court, in explaining why it was drawing the line between TEA cases (absolute liability) and environmental cases (voidable liability) characterized cases on the absolute liability side of the divide thus: "There is nothing remarkable in the fact that claims against employers for discriminatory employment actions with tangible results, like hiring, firing, promotion, compensation, and work assignment, have resulted in employer liability once the discrimination was shown." *Id.* at 790.

- affecting other employees under his or her control";¹³⁷
2. "[is] the means by which the supervisor brings the official power of the enterprise to bear on subordinates";¹³⁸
 3. requires an official act of the enterprise, a company act;
 4. constitutes a significant change in employment status, such as hiring, firing, failing to promote, re-assignment with significantly different responsibilities, denial of a raise or a decision causing a significant change in benefits;
 5. *in most cases* inflicts direct economic harm;
 6. *in most cases* is documented in official company records, and may be subject to review by higher level supervisors.¹³⁹

By their terms, the first four of these factors are essential conditions to finding an act to be a TEA. The last two, economic harm and documentation/review, are typical, but not inevitable, characteristics of a TEA.¹⁴⁰ By treating these two traits in this way, the Court evinced an intent that decision makers engage in analysis responsive to the context. For example, there may be cases where the employee is NOT harmed economically, but in which it is nevertheless decided that the supervisor's act constitutes a TEA.¹⁴¹ Likewise, there may be situations in which the action taken is not reported and does not receive higher management's imprimatur, but is nevertheless a TEA. The opportunity for upper management

137. *Ellerth*, 524 U.S. at 762.

138. *Id.*

139. *Id.* at 761-62.

140. Although economic harm often received emphasis in prior case law, *see* Crady v. Liberty Nat'l. Bank & Trust Co., 993 F.2d 132, 136 (7th Cir. 1993), post-*Ellerth* courts have observed the Supreme Court's caution that economic harm is not a necessary condition for the finding of a TEA. *See* Johnson v. Booker T. Washington Broad. Serv. Inc., 234 F.3d 501, 513 (11th Cir. 2000) (fact of economic harm is dispositive in favor of finding TEA, but, absent economic harm, fact-finder must assess whether reasonable person would have found transfer to constitute TEA); Reinhold v. Virginia, 151 F.3d 172 (4th Cir. 1998); Sanchez v. Denver Pub. Sch., 164 F.3d 527, 532 (10th Cir. 1998); Jeffries v. State of Kansas, 147 F.3d 1220, 1232 (10th Cir. 1998); Bonora v. UGI Utils., Inc., No. 99-5539, 2000 U.S. Dist. LEXIS 15172, *18-22 (E.D. Pa. Oct. 18, 2000) (absence of economic harm not dispositive of TEA issue); Kause v. Alberto-Culver Co., No. 97 C3085, 2000 U.S. Dist. LEXIS 10986 (N.D. Ill. June 28, 2000); Steven D. Baderian, et al., *Symposium: Managing Employment Risks In Light Of The New Rulings In Sexual Harassment Law* 21 W. NEW ENG. L. REV. 343, 361 (1999).

141. *Cf.* United States v. Grimes, 244 F.3d 375 (5th Cir. 2001); United States v. Carroll, 190 F.3d 290 (5th Cir. 2000); SEC v. Palmisano, 135 F.3d 860 (2d Cir. 1998).

to review may be crucial in many cases, but will not be helpful in other cases. Nevertheless, Professor Michael Harper has argued that the last listed factor, "documentation and opportunity for review," is the only one that really matters, and has advocated limiting TEA's to those supervisor acts that are "recorded or reported," and that receive the higher management's imprimatur.¹⁴²

Professor Harper's article responds to a perceived want of persuasive supporting rationale in the *Ellerth/Faragher* opinions.¹⁴³ Harper sets out to supply a policy analysis to correct the opinions' "formulaic" use of agency principles and truncated invocation of Title VII policy and precedent, which leave the opinion neither "convincing" nor "adequately explicative of the meaning of the structure to be applied to future difficult cases."¹⁴⁴ The primary purpose of his article is to supply rationale and policy justifications in support of the *Ellerth/Faragher* decision to allow the defense in non-TEA cases.¹⁴⁵ In Harper's view, the reason why allowing defendants an affirmative defense in environmental harassment cases makes sense is that victims of non-TEA harassment can "prevent discrimination at lower cost than controlling management," except where management has failed to make accessible safe channels for employees to complain.¹⁴⁶ According to Harper, upper management can, with little cost, control discrimination in formal job actions "because such decisions have been made available for review and have been effectively passed on or acquiesced [in] by senior management."¹⁴⁷

Relying on the sound rationale that he has supplied for the Court's decision, Harper then argues that TEA's should be limited to those job actions as to which "the discriminating supervisor has recorded or reported his discriminatory action so that it is readily available for review."¹⁴⁸ Professor Harper states that "employers are lower cost-avoiders of *discriminatory actions* that are overt and thus subject to review; employee victims may be lower cost avoiders only of covert actions that have not been reported to management."¹⁴⁹

142. Harper, *supra* note 55, at 75.

143. *Id.* at 41.

144. *Id.* at 49.

145. *Id.*

146. *Id.* at 64.

147. *Id.* at 66.

148. *Id.* at 75.

149. *Id.* at 75 (emphasis added). In fact, the supposed dichotomy is not inevitable. Thus, the discriminating supervisor may, knowing that his bias motivates a hiring decision, be especially diligent in documenting the nondiscriminatory justifications for the decision, or the harassing supervisor may be quite obvious when engaging in harassment so severe or pervasive that it creates an actionably hostile environment.

Although Professor Harper's rationale supplies a good argument for including in the TEA category actions that are official and on the record, it does not warrant excluding actions that are not on the record. Other cost-based rationales can be made for the Court's line drawing. Cost-avoidance arguments can also be made for including as TEA's actions that make use of delegated authority, regardless of whether or not they receive review at higher levels. Professor Harper's argument focuses on post-TEA correction and employer opportunity to correct actions that are official and on the record. A similar cost-avoidance argument can be made for pre-TEA cost-avoidance. The employer is capable of and responsible for cost-avoidance in hiring and training supervisors in how to use the power delegated to them in a nondiscriminatory way.

C. Finding in the Ellerth/Faragher Realignment of Categories, Alterations of the Standards Operative Within the Categories.

One court has read in *Ellerth/Faragher* a suggestion that TEA's differ from the "tangible job detriment" that had previously operated in quid pro quo analysis.¹⁵⁰ This court imposed a higher employer action hurdle than plaintiffs bore under the quid pro quo structure.¹⁵¹ Yet, in the Supreme Court's transition from quid pro quo to TEA and from "job detriment" to "employment action" there is no evidence of such a shift.

After moving from the quid pro quo/environmental paradigm to the TEA/non-TEA paradigm what had previously qualified as quid pro quo harassment continued to qualify for absolute liability as a TEA. Although the Court listed factors courts might consider in ascertaining whether a given supervisor act qualified as a TEA, it based that list on pre-existing lower court doctrine. Thus, a pre-*Ellerth* court that would have recognized a particular employer act as quid pro quo harassment should, post-*Ellerth*, recognize the same act, if actually carried out, as TEA harassment.

The effect of *Ellerth/Faragher* was to redraw the boundary between the category of cases that warrant absolute liability, and the category of cases that do not. The opinion in *Ellerth* suggests that the types of supervisor acts that had previously qualified to establish quid pro quo harassment would now, if actuated, qualify as

150. *Reinhold v. Virginia*, 151 F.3d 172 (4th Cir. 1998), *superseding* *Reinhold v. Virginia*, 135 F.3d 920 (4th Cir. 1998).

151. *Id.* at 174-75.

TEA harassment. The focus was not on the nature of the acts threatened and whether they were sufficiently adverse, but on the fact that Ellerth's harasser had never acted on his threats.¹⁵² In circuits that had previously limited absolute employer liability to quid pro quo cases, *Ellerth/Faragher* effectively expanded the category of absolute liability cases to include hostile environments that culminated in a TEA, but involved no libido-driven or quid pro quo demands or threats.

In *Reinhold v. Virginia*,¹⁵³ however, the Fourth Circuit concluded that the *Ellerth* case not only imposed a requirement that the threatened act be carried out, but also altered the types of employer acts that, carried out, would be harsh enough to invoke the rule of uniform imputation.¹⁵⁴ Prior to the Supreme Court's *Ellerth* decision, Reinhold won her quid pro quo harassment case before a jury, and the trial and appellate courts upheld that verdict.¹⁵⁵ Once the Supreme Court issued its *Ellerth* decision, however, the panel reheard the case in light of *Ellerth*,¹⁵⁶ and concluded that facts amounting to a "tangible job detriment" for purposes of quid pro quo harassment did *not* amount to a "TEA" under the *Ellerth/Faragher* standard.¹⁵⁷

A psychologist at the Virginia School for the Deaf and Blind, Reinhold suffered her supervisor's unwanted sexual advances for eighteen months.¹⁵⁸ The supervisor, Dennis Martin, conducted an ongoing campaign of harassment.¹⁵⁹ He entered Reinhold's office and there recited a poem about the first time he masturbated, gave Reinhold "pills containing sexually explicit messages," required Reinhold to come to his office, where he repeatedly confessed his attraction to her and professed an inability to control his feelings for her.¹⁶⁰ Martin tried to kiss Reinhold, telephoned her at home (aware that Reinhold's spouse was often away on business) and

152. *Ellerth*, 524 U.S. at 754.

153. 151 F.3d 172 (4th Cir. 1998).

154. *Id.* at 174-75. The Fourth Circuit first addressed the *Reinhold* case in *Reinhold v. Virginia*, 135 F.3d 920 (4th Cir. 1998) (*Reinhold I*). The court vacated *Reinhold I* when it reconsidered the case in light of *Faragher* and *Ellerth*. *Reinhold v. Virginia*, 151 F.3d. 172 (4th Cir. 1998) (*Reinhold II*). The vacated *Reinhold I* opinion remains relevant, however, because the Fourth Circuit's second opinion incorporated by reference the *Reinhold I* statement of facts. *Reinhold II*, 151 F.3d at 173.

155. *Reinhold II*, 151 F.3d at 174.

156. *Id.*

157. *Id.* at 175.

158. *Reinhold I*, 135 F.3d at 923. She counseled children, performed psychological testing, and worked with teachers on student behavioral problems. She also completed the psychological portions of triennial evaluations for each student. *Id.* at 923.

159. *Id.* at 925-27.

160. *Id.*

threatened to retaliate for Reinhold's rejection of his advances.¹⁶¹ Ultimately, the jury concluded that he did retaliate in at least two ways. First, when Reinhold refused Martin's invitation to attend a professional conference alone with him,¹⁶² Martin selected two other employees to accompany him and rejected Reinhold's application to participate.¹⁶³ Second, as Reinhold increased her protestations, Martin increased Reinhold's workload, including work that was entirely outside her job responsibilities.¹⁶⁴

Initially, Reinhold refrained from complaining to school officials.¹⁶⁵ She feared that Martin would harm her physically if he learned that she had reported him and she knew that Martin had a close relationship with school management.¹⁶⁶ After she had endured the harassment for eighteen months, however, Reinhold finally on March 9, 1992 reported Martin's behavior to Ruth Ber- man, the school's business manager, and to the school's human resources director.¹⁶⁷ On the same day, as soon as she had made this report, Reinhold left work and remained on leave until March 18, 1992.¹⁶⁸ Upon investigating Reinhold's complaint, the school initially imposed penalties on Martin, but reduced the severity of those penalties because of Martin's "previously outstanding work performance and dedication to his job."¹⁶⁹

When Reinhold returned to her duties on March 18th, she was assigned to a different building, while Martin was permitted to retain his office.¹⁷⁰ Not only was Reinhold's new office space inadequate for the work she had to do, but it was located in a

161. *Id.* On one occasion, when Reinhold threatened to report the harassment, Martin said that no one would believe her. Reinhold informed him that she had retained copies of poems he had given her. Martin responded by putting his hands around her neck and saying, "surely you threw those out." *Id.* at 925. When Reinhold persisted in her contention that she had, indeed, retained them, Martin responded that what he had done earlier was not sexual harassment, but that "*this* [was]," attempting to kiss her. *Id.* When Reinhold confided to co-worker Kathy Verano, about Martin's behavior, the two women developed a system whereby Verano would interrupt any private meetings between Martin and Reinhold that exceeded five minutes in duration. *Id.*

162. Martin repeatedly invited Reinhold to accompany him on vacations. *Id.* at 926. She responded that she was happily married and she advised him to vacation with his own wife. *Id.*

163. *Id.*

164. *Id.* at 925.

165. *Id.* at 926.

166. *Id.*

167. *Id.* at 923, 926.

168. *Id.* at 926. Reinhold was subsequently diagnosed as suffering from post-traumatic stress disorder and depression caused by the harassment and the inadequacy of the school's response. *Id.* at 928.

169. *Id.* at 927.

170. *Id.* The school said this measure was required because of the equipment needed for his work. *Id.*

building that was especially prone to racial tension, where Reinhold was subjected to racial slurs and hostility, including exhibition of posters expressing support for Martin.¹⁷¹ When Reinhold complained to Berman and human resources about the hostility to which she was being subjected in her new location, the school refused to take action.¹⁷²

Finally, on March 27, with the approval of the school's superintendent, Martin circulated an exculpatory memorandum, trivializing the harassment incident that had caused him to lose his role as department coordinator.¹⁷³ In Reinhold's view, the school's approval of Martin's circulating this memorandum effectively excused Martin's actions, further lessened the impact of the discipline, and treated Martin, rather than Reinhold, as the victim.¹⁷⁴ "Stating that the March 27 memo was the 'last straw,' Reinhold gave notice of her resignation on March 30, 1992."¹⁷⁵

The jury awarded her \$85,000 in damages to be paid by the school.¹⁷⁶ In the first *Reinhold* appeal (*Reinhold I*), the Fourth Circuit applied the pre-*Ellerth/Faragher* standards. In the words of the *Reinhold I* court, "Quid pro quo sexual harassment occurs when an employer conditions, explicitly or implicitly, the receipt of a job benefit or a tangible job detriment on the employee's acceptance or rejection of sexual advances."¹⁷⁷

Applying this pre-*Ellerth* standard, the appellate court upheld the verdict for Reinhold on the quid pro quo claim.¹⁷⁸ The court concluded that the supervisor's assigning Reinhold extra work and inappropriate work assignments and denying her the opportunity to attend a professional conference constituted, in pre-*Ellerth* parlance, a "tangible job detriment" sufficient to support a claim of quid pro quo harassment.¹⁷⁹

After the Supreme Court issued its decisions in *Faragher* and *Ellerth*, the panel granted petitions for rehearing to reconsider the

171. *Id.* at 927.

172. *Id.* at 927-28.

173. *Id.* at 928.

174. *Id.*

175. *Id.*

176. The jury returned a verdict for the employer on an additional claim for retaliation in violation of Title VII. *Reinhold II*, 151 F.3d. at 173-74.

177. *Reinhold I*, 135 F.3d. at 931.

178. *Id.* at 936.

179. *Id.* at 933. The court rejected the plaintiff's verdict on the hostile environment claim, not because the environment was not hostile, but because the employer "could not be held liable for any hostile work environment created by [the supervisor] because as soon as [the employer] learned of the harassment, it took adequate remedial action that resulted in the cessation of the offensive conduct." *Reinhold II*, 151 F.3d at 174 (discussing Fourth Circuit's first review of *Reinhold I*).

case in light of *Ellerth/Faragher*.¹⁸⁰ The same three judges¹⁸¹ concluded that the plaintiff had *not* established a TEA and remanded to allow the defendant to assert the affirmative defenses.¹⁸² The court did not explain why a plaintiff who had prevailed under a standard that rendered employers strictly liable on a finding that the plaintiff had suffered a “tangible job detriment,” should fail under a standard that rendered employers strictly liable for harassment involving “TEA’s.”¹⁸³ The Fourth Circuit court acknowledged “that any significant alteration could constitute a [TEA],” and it did not explain what it was about the changes in Reinhold’s work assignment that rendered those changes insignificant.¹⁸⁴ Apparently Reinhold found those changes so significant that she resigned her position because of them. The record, in fact, suggests that Martin’s deliberate retaliation against Reinhold not only significantly altered her employment in its own right, but that the alteration was exacerbated by the school’s complicity in holding Reinhold responsible for Martin’s wrongdoing and refusing to protect her from other employees’ retaliatory harassment of her, all of which ultimately caused Reinhold to resign.

The actions taken against Reinhold were tangible for purposes of the Supreme Court’s definition. Martin acted in his official capacity through higher management in denying her request to attend the conference. The school acted officially in transferring her instead of him, in condoning the self-exculpatory memo and in denying her request for assistance to halt coworkers’ retaliatory harassment of Reinhold.¹⁸⁵

180. *Reinhold II*, 151 F.3d at 173.

181. One of the panel members wrote a dissent in *Reinhold I*, 135 F.3d at 936 (Niemeyer, J., concurring in part and dissenting in part).

182. *Reinhold I*, 135 F.3d at 175.

183. In fact, the first *Reinhold* appellate decision expressly rejected the idea that quid pro quo cases should be restricted to ultimate employment actions, quoting from an earlier Fourth Circuit precedent:

“[t]he supervisory employee need not have ultimate authority to hire or fire to qualify as an employer, as long as he or she has significant input into such personnel decisions.” . . . [W]e stated that “[t]he power to determine work assignments often represents a key element of supervisory authority.”

Reinhold I, 135 F.3d at 934 (alterations in original) (quoting *Paroline v. Unisys Corp.*, 879 F.2d 100, 104 (4th Cir. 1989), *vacated in part on other grounds*, 900 F.2d 27 (4th Cir. 1990)).

184. *Reinhold II*, 151 F.3d at 175.

185. Commentators have disagreed over whether and when an employer’s failure to remedy known co-worker harassment that is in retaliation for the employee’s engaging in protected activities should give rise to employer liability under Title VII’s retaliation provision, section 704, 42 U.S.C. § 2000e-3. Compare Kari Jahnke, *Protecting Employees from Employees: Applying Title VII’s Anti-Retaliation Provision to Co-Worker Harassment*, 19 LAW & INEQ.

The *Ellerth* Court required that a line be drawn between TEA cases where power delegated by the employer to the supervisor enabled the employer to harass the plaintiff and non-TEA cases where the effect of the harassment, though done by a supervisor, was no different from what would have resulted from a co-worker's harassment. Pursuant to this requirement, the Fourth Circuit drew a line in *Reinhold*, but it drew it in the wrong place. Where the Fourth Circuit draws the line is consistent with the *Ellerth* rationale for cases in which the sole cause of the plaintiff's resigning her position is the unwelcome sexual advances. Advances by her co-worker could have had the same result. However, where the supervisor takes retaliatory action against the victim in ways that make use of the powers delegated by the employer, the resulting termination of employment should constitute a TEA after *Ellerth* just as it would have before *Ellerth* and in fact did in *Reinhold I* itself. Where, moreover, the employer's knowing failure¹⁸⁶ to protect the victim from retaliatory harassment for her complaint and the employer's complicity in the harasser's public relations effort to paint the victim, rather than himself, as the culprit ultimately cause the employee to resign her position, the Supreme Court's *Ellerth* rationale points clearly to treating the case as one of TEA.

D. Recognizing TEA's Only in Quid Pro Quo Cases

In the words of the *Ellerth/Faragher* Court, a supervisor's "environmental harassment culminating in a [TEA]" imposes absolute liability on the employer.¹⁸⁷ This language encompasses a broad

J. 101 (2001), with Olson, *supra* note 92. Reinhold's case also reflects problems of disaggregation and elevation of form over substance. Disaggregation entails courts' looking at each in a series of harassing actions taken against a plaintiff in isolation, finding that no single fact amounted to an actionable TEA where, in combination, the actions do, in fact, amount to a TEA. Courts elevating form over substance have been hyper technical in requiring that the company act carry an official imprimatur of the employer, rather than recognizing that the employer's exclusion of the plaintiff from the workplace or other job detriment constitutes a TEA, whether communicated on company letterhead or not. See *Watts v. Kroger Co.*, 170 F.3d 505, 510 (5th Cir. 1999) (considering actions taken against plaintiff individually, rather than in aggregation, to determine that plaintiff has not suffered adverse employment action: "Simply changing one's work schedule is not a change in her employment status. Neither is expanding the duties of one's job as a member of the produce department to include mopping the floor, cleaning the chrome in the produce department, and requiring her to check with her supervisor before taking breaks.").

186. This failure alone should be enough to subject the employer to liability in its own right, without any need to impute the acts of the supervisor to the employer.

187. *Faragher*, 524 U.S. at 808.

range of situations.¹⁸⁸ Although this would include traditional quid pro quo cases, there is nothing in the Court's language that would restrict the TEA characterization to such cases. Nevertheless, many courts have limited the absolute liability category to quid pro quo cases.¹⁸⁹ These courts treat the TEA category as if the *Ellerth* Court had simply carved off a sub-set of what had previously been quid-pro quo cases.¹⁹⁰ Such lower courts treat the hostile environment as a separate claim from the TEA in which it culminates: The hostile environment claim is actionable if severe or pervasive and the TEA claim is treated like any other disparate treatment case.

Although the *Faragher* opinion does not support this reading, the *Ellerth* opinion arguably does. *Ellerth* itself involved threats, so announced its conclusion in terms of threats:

When a plaintiff proves that a TEA resulted from a refusal to submit to a supervisor's sexual demands, he or she establishes that the employment decision itself constitutes a change in the terms and conditions of employment that is actionable under Title VII. For any sexual harassment preceding the employment decision to be actionable, however, the conduct must be severe or pervasive. Because *Ellerth's* claim involves only unfulfilled threats, it should be categorized as a hostile work environment claim which requires a showing of severe or pervasive conduct.¹⁹¹

The language of *Ellerth*, while including actuated quid pro quo cases in the absolute employer liability category does not necessarily restrict the definition of TEA's to quid pro quo claims.¹⁹² Moreover, the *Faragher* case, which did not involve quid pro quo threats, included no reference to such threats in its articulation of

188. See *Lissae v. S. Food Svc.*, 159 F.3d 177, 184 (4th Cir. 1998) (Michaels, J, dissenting) (TEA occurs whenever the action taken against the plaintiff is in any way related to the harassment). Thus, the boss who retaliates against a worker because the worker refuses the boss' sexual advance exposes the employer to the same liability as the boss who retaliates because the worker reports the boss' open and active hostility toward women in the workplace. In either event, the nexus between the harassment and the adverse action is established by proof of the harassment and the single actor.

189. See, e.g., *Farjam v. N.Y. Health & Hosp. Corp.*, 96 Civ. 1231 (KMW) (RLE), 2000 U.S. Dist. LEXIS 3741, *48 (S.D.N.Y. Mar. 23, 2000).

190. If the case does not involve sexual advances whose rejection motivates the supervisor to take the TEA, the case is deemed environmental.

191. *Ellerth*, 524 U.S. at 753-54. (citations omitted)

192. The middle sentence in the above quotation (regarding actionability of the environmental portion alone) may be read as clarification of the standard of proof for the environmental portion if pursued independently, rather than intended to exclude the environmental portion of the claim from the absolute liability category.

the holding. As set forth in *Faragher*, the standard for absolute employer liability focuses simply on the harassment's culmination in TEA, without regard to the presence of sexual demands—

An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no TEA is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence.¹⁹³

Arguably, then, *Ellerth* means to exclude non-actuated threats, but to include non-quid pro quo TEA harassment that did not involve threats to begin with.

Courts limiting TEA to cases involving rejection of sexual demands, view the situation as giving rise to two claims: One for the hostile environment, if it was sufficiently severe or pervasive to be actionable; and one for the TEA, which is treated as a traditional disparate treatment claim. One problem with breaking up the case in this manner is that the harassment preceding the TEA becomes mere evidence in the disparate treatment case, rather than a part of the TEA claim, even where the earlier harassment is inextricably a part of the process that resulted in the TEA.¹⁹⁴ As an independent cause of action, the environmental claim is defeated by the affirmative defense, on which, given current trends, it may be safe to assume the defendant will prevail. An analytic structure that recognizes TEA harassment only if sexual advances are involved excludes large numbers of serious harassment cases entirely from any Title VII protection.

The case of Angel Watkins is illustrative.¹⁹⁵ According to Watkins' evidence, her immediate supervisor, Kelly, harassed her.¹⁹⁶ The

193. *Faragher*, 524 U.S. at 689.

194. Treating such harassment claims in accordance with proof structures employed for straight disparate treatment claims poses its own problems. A successful environmental harassment case, preceding a TEA, creates a very persuasive case that the animus that caused the environmental harassment also caused the TEA regardless of whether the harassment was severe or persuasive. This is undoubtedly so where the same supervisor takes both actions, but even arguably so where more than one supervisor colludes against the plaintiff. Yet, courts' tendency to view all cases through the *McDonnell Douglas* prism, regardless of how direct the evidence, may cause such cases to get hung up on the shoals of requiring the plaintiff to prove the negative—that the defendant's legitimate nondiscriminatory reason was not the real or only reason, even where she has persuaded the trier of fact that the environmental harassment occurred.

195. *Watkins v. Prof'l Sec. Bureau*, No. 98-2555, 1999 U.S. App. LEXIS 29841 (4th Cir. Nov. 15, 1999) cert. denied, 529 U.S. 1108 (2000); see also *Zelaya v. Eastern & Western Hotel Corp.*, No. 99-16179, 2001 U.S. App. LEXIS 3492, *2-3 (9th Cir. Mar. 5, 2001) (finding no

harassment included rape and fondling.¹⁹⁷ Watkins testified that she was required to attend a meeting with three supervisors, including Kelly.¹⁹⁸ At that meeting, she informed the three that she had reported the harassment to the EEOC.¹⁹⁹ In response, and in the presence of the other two supervisors, Kelly immediately terminated Watkins' employment.²⁰⁰

Watkins sued under Title VII, alleging that her termination resulted from her complaints of the sexual harassment.²⁰¹ A jury reached a verdict for Watkins on her claims of harassment and retaliation.²⁰² The trial court set the verdict aside, granting judgment as a matter of law for the employer, and the appellate court affirmed, finding no connection between the harassment and the termination.²⁰³

There are two problems with the appellate court's *Watkins* holding: One in the court's reading of the facts and the other in its reading of the Supreme Court's *Ellerth/Faragher* holding. With respect to the facts of Watkins' case, the problem is that plaintiff's evidence (which the jury believed) showed that it was Kelly, the harasser, who made the decision to terminate Watkins.²⁰⁴ The trial and appellate courts' decision to reject this evidence constituted a clear-cut credibility determination. Courts may, of course, overrule jury findings of fact, but only when no reasonable jury could find the fact as found; the jury's credibility determinations are to be given great deference.²⁰⁵

More importantly for present purposes, the appellate court's reading of the *Ellerth/Faragher* opinions ignores the Supreme Court's definition of TEA, which included situations in which a "hostile environment culminates in a [TEA]." Logically, more than

TEA where supervisor threatened subordinate that, if she told her husband about advances, she would be fired and when she again threatened to tell husband, supervisor took her keys and told her to "go home" which apparently ended her term of employment).

196. *Watkins*, 1999 U.S. App. LEXIS 29841, at *4.

197. *Id.*

198. *Id.* at *5.

199. *Id.* at *6.

200. *Id.*

201. *Id.* at *7.

202. *Id.* at *8.

203. *Id.* at *1-2.

204. According to Watkins' testimony, which the jury apparently believed, the harasser himself, Kelly, told Watkins that she was being terminated at the point in that meeting when Watkins stated that she had reported Kelly's acts to the EEOC. *Id.* at *6. The appellate court noted that "Nicola's account of the termination is diametrically opposed to Watkins' account," but arguably this inconsistency became irrelevant when the jury chose to believe Watkins. *Id.* at *6 n.6.

205. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000).

one supervisor can be responsible for creation of a hostile environment that culminates in a TEA.²⁰⁶ Watkins met with all three of her supervisors, Fisher, Nicola, and Kelly.²⁰⁷ In the course the meeting, the higher-ups allowed Kelly, the harasser, to terminate Watkins when she informed them of her complaint to the EEOC.²⁰⁸ The harassment of plaintiff did culminate in the TEA, although her rejection of the harasser's sexual advances did not immediately precipitate the TEA.

Jennifer Elmasry's case received similar treatment.²⁰⁹ Elmasry's immediate supervisor, Bill Veith, hired Elmasry in November of 1997 and fired her four months later.²¹⁰ In the interim, he sexually harassed Elmasry, touching and commenting upon her intimate body parts, hugging her, and offering her favors, including money and free meals.²¹¹ Elmasry "did not want to accept these favors but felt that she had to because Veith was her boss. She . . . believed that Veith wanted some sort of sexual relationship with her in return for the favorable treatment he gave her."²¹² She repeatedly told Veith that his attentions were unwelcome.²¹³ There would have been little point in reporting the harassment to higher management, because Veith's supervisor, Nar Handa, shared Veith's attitude.²¹⁴ When Handa was about to visit the plant, Veith told

206. *Watkins*, 1999 U.S. App. LEXIS 29841, at *13 ("Watkins herself acknowledges [there was no TEA] by arguing that she was terminated in retaliation for threatening to report Kelley's conduct to the police and the EEOC."). In fact, Watkins' evidence suggested that three supervisors were responsible for the creation of a hostile environment that included the sexual assault incidents by one of the three. The evidence showed that one of the non-assaulting supervisors suggested to Watkins that she should be thanking the assaulting supervisor for her position because Watkins otherwise would have been terminated. *Id.* at *4. *But see* Louis DiLorenzo & Laura Harshbarger, *Employer Liability for Supervisor Harassment after Ellerth and Faragher*, 6 DUKE J. GENDER L. & POL'Y 3, n. 107 (arguing that TEA must be imposed by the harasser).

207. *Watkins*, 1999 U.S. App. LEXIS 29841 at *5-6.

208. *Id.* at *6.

209. *Elmasry v. Veith*, No. 98-696-JD, 2000 U.S. Dist. LEXIS 340 (D.N.H. Jan. 7, 2000).

210. *Id.* at *3.

211. *Id.* at *3-5.

212. *Id.* at *5. Under company policy, Veith was the proper authority to receive Elmasry's reports of harassment. She repeatedly complained to Veith himself about his behavior, but to no avail. *Id.* at *22-23.

213. *Id.* at *22.

214. At Elmasry's deposition, the following colloquy took place:

Q. And it was your conclusion that once you told Bill [Veith] you didn't like the way he was talking, and he continued to talk that way, that there was nothing else you could do? Is that what you—

A. There was no one else to turn to. Because I had already met [higher management] and . . . they were like him.

Elmasry to "wear her hair down, a nice dress and high heeled shoes," and warned her that Handa "might try to take her away from Veith . . . when he saw her breasts."²¹⁵

Shortly before Veith fired Elmasry, he invited her out for her birthday and told her that he had "something special" for her.²¹⁶ Afraid of Veith, Elmasry complained to the police, who told her to stay home from work.²¹⁷ After Elmasry had stayed home for two days, Veith fired her for missing work.²¹⁸

Even though Elmasry's harasser fired her, the court granted summary judgment for the employer on the TEA issue, stating that "[i]f Veith [had] fired Elmasry because she refused to submit to his sexual demands, the firing would [have] constitute[d] a TEA."²¹⁹ Because the court found no TEA, it allowed the defendant to assert the affirmative defense.²²⁰ Yet, the harassment clearly *culminated in a* TEA. Admittedly, Elmasry's unexcused absence intervened as a cause, but the reason for her unexcused absence was the need to avoid the harasser and the unavailability of any other recourse. By constraining the TEA definition to include only quid pro quo harassment, the court excluded on a summary judgment motion what, if proved true, would have been a flagrant case of TEA harassment.

*E. Conflation of Retaliation Doctrine and Harassment Doctrine*²²¹

Because harassment often involves retaliation, a single set of facts may create claims for both TEA harassment and section 704

215. *Id.*

216. *Id.* at *6.

217. *Id.* at *7.

218. *Id.* at *7.

219. *Id.* at *17.

220. *Id.* at *26. In addition, because it found no TEA, the court required the plaintiff to show that the harassment was severe or pervasive.

221. Section 704(a) of Title VII forbids employer retaliation for employee assertion of Title VII rights. Such assertions may consist of participation in administrative or judicial proceedings to enforce Title VII rights or less formal opposition to practices that (the employee reasonably believes) violate Title VII. The latter include employee protests directly to the discriminating supervisor.

As long as Title VII forbids or appears to forbid the discrimination in question, Title VII prohibits retaliation, even though the employee actually invokes a legal ground other than Title VII itself. Thus if the employee invokes a state law protection that duplicates Title VII, Title VII prohibits retaliation. In addition, as explained below, the employee's reasonable belief that a violation has occurred is sufficient to create a right against retaliation even though ultimately there may prove to have been no violation.

retaliation.²²² Consider, for example, a supervisor who asks a subordinate to engage in sexual acts and fires the subordinate when she objects to those requests.²²³ This is clearly a case of TEA harassment; it also qualifies as retaliation under section 704.²²⁴ Although many Title VII cases qualify as both harassment and retaliation, litigants and courts have not systematically acknowledged that overlap or crafted any coherent process for choosing which doctrine (if not both) should apply to the facts of a given case.

TEA analysis can be very different from retaliation analysis, so the court's decision about which type of analysis applies to a particular case may determine the outcome.²²⁵ The statutory basis for

222. Because there are TEA's that do not constitute direct retaliation for rejection of a sexual advance or complaint about sexual harassment, there are TEA's that do not qualify for analysis under section 704.

223. See *Johnson v. Booker T. Washington Broad. Serv.*, No. 99-6078, 2000 U.S. App. LEXIS 30772, *10 (11th Cir. Nov. 29, 2000) ("statutorily protected expression includes . . . complaining to supervisors about sexual harassment") (citing *Rollins v. State of Fla. Dep't of Law Enforcement*, 868 F.2d 397, 400 (11th Cir. 1989)). If the supervisor accompanies the request with a threat that the subordinate will be fired if she refuses, the case involves traditional quid pro quo harassment. As discussed above, non-quid pro quo TEA's are equally exempt from the *Ellerth* affirmative defenses.

224. Examples of other situations in which both TEA harassment doctrine and section 704 retaliation doctrine could apply are:

1. A supervisor engages in severe or pervasive harassment of a subordinate employee because of the subordinate's sex. The subordinate complains, whether to the harassing supervisor or to higher management. The supervisor fires the subordinate because of the complaint.
2. As in the previous facts, a supervisor engages in severe or pervasive harassment of a subordinate employee because of the subordinate's sex, and the subordinate complains.
3. The supervisor does not fire the subordinate when the latter complains, but—because of the complaint—refuses to protect the subordinate when other employees harass the subordinate, whether the latter harassment is in response to the complaint or in response to the victim's sex. This last set of facts poses the additional problem of whether and when employer's retaliatory actions do not consist of formal official personnel actions, retaliation may nevertheless be found.
4. A supervisor refuses to give a subordinate a promotion because the subordinate is a woman. The subordinate complains to higher management or human resources. As a result of the complaint, the supervisor creates a hostile work environment for the subordinate. See *Richardson v. Dept. of Corr.*, 180 F.3d 426, 443 (2d Cir. 1999) (noting "no disagreement that Richardson engaged in protected activity when she complained to supervisors about harassment").

225. The ramifications of such cross-pollination can be dispositive in the environmental context as well. Consider the case of a subordinate who reports the hostile environment to which a group of supervisors subjects her and who is harassed more as a result. Some circuits recognize section 704 retaliation claims for such retaliatory harassment (i.e., do not impose the heightened harm requirements discussed earlier in this article). See *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1456 (11th Cir. 1998)) (citing *Wyatt v. City of Boston*, 15-16 (1st Cir. 1994); *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 984-86 (10th Cir. 1996); *Yartsoff v.*

sexual harassment claims is section 703, which prohibits discrimination in the terms, conditions or privileges of employment. The statutory basis for retaliation claims, section 704, prohibits employer retaliation for employees' opposition to any practice (including sexual harassment) prohibited by Title VII.²²⁷ The primary reason why the choice between section 703 and section 704 can be dispositive is that "mixed motive" analysis, which all circuits apply in appropriate section 703 cases, is unavailable in the section 704 cases of some circuits.²²⁸ Mixed motive analysis allows plaintiffs to prevail (though with reduced remedies) by showing that, even though the defendant shows that other, non-discriminatory, reasons were also at work.²²⁹ By the terms of Title VII, mixed-motive analysis is available in section 703 cases.²³⁰ Because the statute is silent on the availability of mixed motive analysis in retaliation cases,²³¹ some circuits have refused to apply mixed motive doctrine

Thomas, 809 F.2d 1371, 1375 (9th Cir. 1987)); Olson, *supra* note 92, at 258. If these circuits allow the section 704 claim, but import the *Ellerth* affirmative defense, the harassment will go unremedied. Because courts tend to presume that employers have made reasonable efforts to respond to harassment, the protections of section 704 will thereby have been weakened.

226. In 1998, the Supreme Court held that the term, "employees," for purposes of section 704, includes former employees. *Robinson v. Shell Oil*, 519 U.S. 337 (1997).

227. In addition to protecting employees' informal opposition to discrimination, section 704 protects their participation in processes available for challenging discrimination. In April of 2001, the Supreme Court considered a case in which the Ninth Circuit had applied the "reasonable belief" standard. *Clark County Sch. Dist. v. Breeder*, 532 U.S. 268 (2001). In that case, the plaintiff had protested her supervisor's snickering in the plaintiff's presence with a male co-worker about sexual references in a job application. *Id.* at 269. The Supreme Court found it unnecessary to resolve the split in the circuits on whether the plaintiff's reasonable belief that the conduct violates Title VII. *Id.* at 270. Even assuming that was the standard, the Court stated, "[n]o reasonable person could have believed that the single incident recounted . . . violated Title VII's standard." *Id.* at 271. Given the professed confusion among the general public about what is and is not sexual harassment, this victim's conclusion that her supervisor's conduct violated the law is not so far fetched that the court should remove the decision from the jury as here happened in the grant of summary judgment for the employer. Surely this is quintessentially a jury issue. See Deborah Zalesne, *Sexual Harassment Law: Has it Gone too Far, or Has the Media?* 8 TEMP. POL. & CIV. RTS. L.R. 351, 353 (1999) (describing public confusion about what constitutes harassment).

228. See *Tanca v. Nordberg*, 98 F.3d 680, 684 (1st Cir. 1996), *cert. denied*, 520 U.S. 1119 (1997) (rejecting mixed motive analysis for retaliation cases).

229. Civil Rights Act of 1991, Pub. L. Nos. 102-166, Title I, §§ 105, 106, 107(a), 108, 105 Stat. 1074-1076 (1991), codified as amended 42 U.S.C. § 2000e-2(m) (adding Title VII § 703(m)).

230. 42 U.S.C. § 2000e-2(m).

231. The availability of mixed motive analysis benefits plaintiffs by allowing victory even where discrimination is not the only reason. But it also helps defendants, by reducing remedies when they show they would have reached the same decision against the plaintiff even in the absence of the discriminatory reason:

- (B) On a claim in which an individual proves a violation under section 703(m) [42 USCS § 2000e-2(m)] and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—

in those cases.²³² In the latter group of circuits, even though the plaintiff proves that the defendant has retaliated, the defendant may prevail by demonstrating that nondiscriminatory factors were also at work in the decision against the plaintiff.²³³

-
- (i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 703(m) § 42USCS § 2000e-2(m)]; and
 - (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A)

Id.

232. A majority of the circuits have declined to recognize mixed motive analysis in section 704 retaliation claims. The Seventh Circuit in *McNutt v. Board of Trustees*, for example, observed that Congress had explicitly addressed retaliation claims in other sections of the 1991 Civil Rights Act, but not in the provision that authorized mixed-motive analysis. 141 F.3d 706, 707–09 (7th Cir. 1998). Other circuits have agreed. *See* *Kubicko v. Ogden Logistics Serv.*, 181 F.3d 544, 552 n.7 (4th Cir. 1999); *Woodson v. Scott Paper Co.*, 109 F.3d 913, 933–35 (3d Cir. 1997), *cert. denied*, 522 U.S. 914 (1997); *Tanca v. Nordberg*, 98 F.3d 680, 684–85 (1st Cir. 1996), *cert. denied*, 520 U.S. 1119 (1997); *see also* *Lewis v. Young Men's Christian Ass'n*, 208 F.3d 1303, 1305 (11th Cir. 2000) (Civil Rights Act does not apply to dual motive retaliation claim under ADEA); *cf.* *Norbeck v. Basin Elec. Power Coop.*, 215 F.3d 848, 852 (8th Cir. 2000) (mixed-motive analysis unavailable in retaliation cases under the False Claims Act). *But see* *DeLlano v. N.D. State Univ.*, 951 F. Supp. 168, 170 (D.N.D. 1997) (holding that Civil Rights Act provisions apply to mixed motive retaliation cases); *Hall v. City of Brawley*, 887 F. Supp. 1333, 1346 (S.D. Cal. 1995) (same). This is inconsistent with the position taken by some Title VII experts, who argue that section 704 should be given a more pro-plaintiff construction than section 703:

Indeed, as some courts have noted, the statutory language of section 704, which contains no reference to "compensation, terms, conditions, or privileges of employment," may suggest a broader sweep for section 704 than for section 703.

McDonnell v. Cisneros, 84 F.3d 256, 262 (7th Cir. 1996); *see also* *Essary & Friedman*, *supra* note 87 at 140–41 ("The anti-retaliation provision, which is not limited to a specific definition, as is the substantive discrimination provision, may be construed more broadly. . ."); EEOC Guidance on Retaliation Claims, [Analyzing Retaliation Claims, 1998 Daily Lab Rep., (BNA) 100 d27 (May 20, 1998)] ("The retaliation provisions set no qualifiers on the term ['to discriminate,' and therefore prohibit any discrimination that is reasonably likely to deter protected activity. They do not restrict the actions that can be challenged to those that affect the terms and conditions of employment."]; *White*, *supra* note 84, at 1164 n.234.

233. *See* *Tanca v. Nordberg*, 98 F.3d 680, 684 (1st Cir. 1996), *cert. denied*, 520 U.S. 1119 (1997) (rejecting mixed motive analysis for retaliation cases). The 1991 Civil Rights Act amendments to Title VII provide:

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices. Except as otherwise provided in this title [42 USCS §§ 2000e et seq.], an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

Pub. L. Nos. 102-166, Title I, §§ 107, 112, 113(b), 105 Stat. 1075, 1078, 1079. Although, ostensibly, the *McDonnell Douglas* framework fits the section 704 retaliation context, courts have used the *McDonnell Douglas* analysis in direct evidence cases in ways that eliminate the

The case that Elizabeth Smith filed against First Union Bank demonstrates other problems that occur where section 704 jurisprudence intersects with TEA doctrine.²³⁴ Smith essentially lost both her harassment claim and her retaliation claim. The harassment claim failed in the sense that the court treated it as non-TEA, thus allowed the affirmative defense to go forward.²³⁵ She lost on the retaliation claim because the appellate court disaggregated the facts comprising the retaliation with the result that there appeared to be no connection between the harassment and the adverse employment action underlying her retaliation claim.

Smith's supervisor, Scoggins, "subjected Smith to a barrage of threats and gender-based insults."²³⁶ In addition to general and often obscene derogation of women's professional abilities, Scoggins threatened Smith with physical violence.²³⁷ Smith did not initially complain because Scoggins told her that "she would lose her job if she complained about his conduct," and Scoggins' superior also warned Smith that "she should never complain to human resources."²³⁸ Smith endured the harassment for more than a year, until she became fearful that Scoggins would carry out his threats of physical violence, at which time she registered a complaint with Marc Hutto, the Bank's human resources representative.²³⁹ She

possibility that plaintiffs can win mixed-motive cases. See *Cleary v. Nationwide Mut. Ins. Co.*, No. 00-1461, 2001 U.S. App. 11318, *11-14 (4th Cir. May 31, 2001) (requiring plaintiff to show that defendant's proffered legitimate nondiscriminatory reason pretextual even if plaintiff has proved causal connection between plaintiff's protected act and adverse action taken by plaintiff). But see *Marquez v. Baker Process, Inc.*, No. 01-4019, 2002 U.S. App. LEXIS 13288, *6-13 (10th Cir. July 2, 2002) (applying McDonnell Douglas to direct evidence retaliation case and reversing summary judgment for employer). This, operating in tandem with other courts' express denial of mixed motive analysis in retaliation cases, has sharply curtailed the protections afforded by section 704.

234. *Smith v. First Union Nat'l Bank*, 202 F.3d 234 (4th Cir. 2000).

235. *Id.* at 246-47. Smith obtained a technical victory on appeal in that the appellate court found that there was a genuine issue of fact on whether the bank had proved both elements of the affirmative defense. *Id.* She lost, however, in that the case received treatment as a non-TEA case to begin with.

236. *Id.* at 238. Among his harassing comments were that Scoggins wished he were a woman so that he could "whore his way through life" and that the "only way for a woman to get ahead at First Union is to spread her legs." *Id.* at 243 n.6.

237. Scoggins stood over Smith's cubicle and barked orders at her and often concluded his orders to her with the remark, "or else you'll see what will happen to you." *Id.* at 239. He also threatened her when he called her at home at 10:00 p.m., accusing her of conspiring with his supervisor, George Andrews, to "get him." *Id.* at 239. "Scoggins made what a jury could find was a thinly veiled threat to kill Smith because of her gender in a way that made Smith feel that he was serious about harming her, especially in light of Scoggins' boasting about 'taking people out' while he was in the military." *Id.* at 243.

238. *Id.* at 245.

239. *Id.* at 240.

asked to be reassigned immediately to a workstation out of the vicinity of Scoggin's workstation.²⁴⁰

First Union did not investigate Smith's sexual harassment allegations, but suspended both Scoggins and Smith with pay and referred both to the company's Employee Assistance Program (EAP). When Smith informed the EAP counselor, Michael Price, of Scoggins' harassment, Price advised her not to return to a work site near Scoggins.²⁴¹ First Union then agreed to transfer Smith to a different team, but the new team was only 100 feet from Scoggins' team.²⁴² Smith consulted a therapist, who told her that she suffered from "an adjustment disorder caused, at least in part, by Scoggins' harassing conduct."²⁴³ The therapist advised her not to work in Scoggins' vicinity.²⁴⁴ When Smith informed Hutto of this advice, Hutto became annoyed and warned her that she would be terminated if she did not submit her disability papers within fifteen days.²⁴⁵ Hutto subsequently advised Smith that she would be permitted to come back to work to a position away from Scoggins only if she first returned to her former position in Scoggins' area.²⁴⁶ Smith declined to follow Hutto's instructions.²⁴⁷ Ostensibly, the bank relented, allowing Smith to apply for other jobs at First Union without first returning to work in Scoggins' area.²⁴⁸ Although she applied for seventy-five openings, however, she received no offers.²⁴⁹ She remained on disability leave until July 1995, when the bank fired her.²⁵⁰

The federal district court granted the bank's motion for summary judgment on all counts.²⁵¹ The Fourth Circuit reversed the trial court on the question of whether Scoggins' behavior created an actionable hostile environment.²⁵² Clearly, the Fourth Circuit said, it did.²⁵³ On the question of whether the Bank should be held

240. *Id.* at 239.

241. *Id.* at 240.

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.* at 234.

250. *Id.*

251. *Id.* at 241.

252. *Id.* at 246-47.

253. *Id.* at 241-44. Scoggin's treatment of Smith was: (1) because of her sex; (2) unwelcome; and (3) severe or pervasive. *Id.* The trial court had concluded, as to (1) that Scoggins was abusive toward members of both sexes, thus not motivated by Smith's sex. The appellate court concluded that the harasser's disparaging references to plaintiff's sex made it clear

vicariously liable for the harassment, however, the Fourth Circuit affirmed summary judgment for the employer.²⁵⁴ The Fourth Circuit allowed the defendant to invoke the *Ellerth/Faragher* defense because "Smith ha[d] not allege[d] that she suffered a tangible employment action due to Scoggin's harassment."²⁵⁵ Excluding the TEA issue meant that the plaintiff's only hope for recovery lay in the retaliation claim.

On the retaliation claim, however, the appellate court also affirmed summary judgment for the defendant.²⁵⁶ Smith's retaliation claim was that First Union retaliated against her because she complained about Scoggins' harassment of her.²⁵⁷ The Fourth Circuit disaggregated the facts underlying the retaliation claim: (1) it recognized that Hutto harbored an animus toward Smith that might have contributed to her ultimate termination; (2) it recognized that Hutto's animus toward Smith resulted directly from her disability claim; (3) it recognized that the disability claim resulted directly from the harassment and First Union's refusal to reassign Smith away from the harasser.²⁵⁸ Yet, the court refused to draw the necessary conclusion that the harassment thus culminated in Smith's termination. If the court had indeed followed its own edict: to view the facts at the summary judgment stage in the light most favorable to the non-moving party, it would have left to the jury to decide the question of whether the harassment culminated in the termination, rather than granting summary judgment for the defendant.

The fact that Smith did indeed offer sufficient proof to avoid summary judgment on the retaliation question necessarily means that she should have prevailed on the TEA issue and thus avoided any need even to consider the affirmative defense. The employer in this case took action against Smith (firing her) in retaliation for her submitting a disability claim, which claim she submitted be-

that Scoggins was motivated by Smith's sex. On the requirement of severity or pervasiveness, the trial court had found for the employer because "[P]laintiff has not claimed that Scoggins ever inappropriately touched, propositioned or ogled her, that Scoggins ever invited her, explicitly or by implication, to have sex with him or to go out on a date with him." *Id.* at 242. The Fourth Circuit disagreed, explaining that the district court "failed to recognize that a woman's work environment can be hostile even if she is not subjected to sexual advances or propositions." *Id.* (citations omitted).

254. *Id.* at 244.

255. *Id.* at 244. According to the appellate court, the parties had fully briefed the *Ellerth/Faragher* issues, so the failure the plaintiff's failure to raise the tangible employment action possibility may have constituted a waiver of the issue.

256. *Id.* at 249.

257. *Id.* at 241.

258. *Id.* at 249.

cause the employer refused to offer a non-hostile environment in which to work.

The intersection between retaliation doctrine and TEA harassment doctrine thus resembles a minefield for plaintiffs with even the most meritorious claims. It is uncertain whether the *Smith* court would have required a closer causal nexus for retaliation than for harassment culminating in a TEA. What is clear is that the court's decision not to consider the TEA possibility left the plaintiff with only a retaliation claim, which the court disaggregated into separate factual units to avoid finding a causal nexus. Once the facts were disconnected, the court then declined to apply mixed motive analysis, so that the permissible motive (the disability claim) sufficed to exonerate the defendant completely.

CONCLUSION

In sexual harassment litigation, the decision whether to characterize a supervisor's harassment as TEA often decides the outcome of the case. If the supervisor's action is deemed a TEA, the plaintiff has a possibility of prevailing in imposing liability on the employer. If the supervisor's action is not deemed a TEA, the employer's ability to invoke the *Ellerth/Faragher* affirmative defense is likely to result in the employer's immunity from liability for Title VII violations. Despite the importance of how the supervisor's act is characterized, courts have employed several analytical methods that have weighted the process very heavily against the TEA characterization. These methodologies evince intrinsic flaws that warrant careful rethinking by the courts, for their current use effectively thwarts the promise of Title VII.

